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and

U.S. Court of International Trade

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DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

NOTICE

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U.S. Customs Service

Treasury Decisions

19 CFR Part 133

(T.D. 98–21)

RIN 1515–AB28

COPYRIGHT/TRADEMARK/TRADE NAME PROTECTION; DISCLOSURE OF INFORMATION

AGENCY: Customs Service, Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations to allow Customs to provide to intellectual property rights (IPR) owners sample merchandise and to disclose to IPR owners certain information regarding the identity of persons involved with importing merchandise that is detained or seized for infringement of the IPR owner's registered copyright, trademark, or trade name rights. These amendments will assist Customs in making infringement determinations and enable concerned IPR owners to more expeditiously proceed to enforce their property rights by means of instituting appropriate judicial remedies against the parties identified as being involved with infringement of the rights of the IPR owner.

EFFECTIVE DATE: April 13, 1998.

FOR FURTHER INFORMATION CONTACT: The Intellectual Property Rights Branch, Office of Regulations and Rulings, (202) 927–2330.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On August 23, 1993, the Customs Service published a Notice of Proposed Rulemaking in the Federal Register (58 FR 44476) regarding the disclosure to intellectual property rights (IPR) owners of sample merchandise and certain identifying information regarding the identity of persons involved with importing merchandise that is either detained or seized for infringing copyright, trademark, or trade name rights. Sixty-five comments were received pursuant to this notice.

Thereafter, the United States, Canada, and Mexico entered into the North American Free-Trade Agreement (NAFTA) and, on December 8, 1994, the President signed the Uruguay Round Agreements Act (URAA)(Pub.L. 103–465, 108 Stat. 4809), both of which contain provisions pertaining to the protection of IPR. The URAA contains the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) (19 U.S.C. 3511) of the Uruguay Round of the General Agreement on Tariffs and Trade (GATT)—now the World Trade Organization (WTO).

On July 14, 1995, Customs published its analysis of the 65 comments in a revised Notice of Proposed Rulemaking (60 FR 36249). The revised Notice, in addition to making changes in response to the comments received, proposed further regulatory changes to make the regulations consistent with certain provisions of the NAFTA and the URAA and to improve the clarity of the proposed regulations. Accordingly, the Background information contained in the revised Notice regarding these agreements remains applicable and is incorporated here by reference.

The comments received in response to the revised Notice of Proposed Rulemaking published on July 14, 1995, and Customs responses to them are set forth below.

Analysis of Comments

Twenty-two comments were received (21 in favor, including 8 with suggested changes to the revised proposal, and 1 against) that raised 7 areas of concern:

(1) disclosure of confidential business information would violate both the Freedom of Information Act (FOIA) and the Trade Secrets Act;

(2) disclosure of confidential importer information to the IPR holder is contrary to the intent of both NAFTA and GATT;

(3) the 30-day notification period does not allow the IPR owner to act expeditiously;

(4) disclosure should include country of origin information;

(5) disclosure should include the date(s) of importation, the port of entry, and a description of the merchandise;

(6) disclosure should include the identity of the importer; and

(7) IPR owners should be allowed to retain samples sent for inspection, and Customs should clarify its position regarding the testing of samples, since testing may result in the destruction of a sample.

1. *Disclosure of confidential business information would violate both the FOIA and the Trade Secrets Act:*

Comment:

Stating that commercial information is "confidential" and, therefore, not subject to public disclosure, one commenter asserts that the proposed disclosure of information would contravene both the Freedom of Information Act (FOIA)(5 U.S.C. 552) and the Trade Secrets Act (18 U.S.C. 1905). Citing the FOIA as providing that confidential infor-

mation is not subject to public disclosure if it would cause substantial harm to the competitive position of the source of the information and the Trade Secrets Act as providing that sensitive business information should not be disclosed unless otherwise provided by law, the commenter states that Customs is bound not to disclose such confidential information as the names and addresses of importers, exporters, and manufacturers, and recommends that Customs withdraw its revised notice.

Customs' Response:

Customs disagrees with these interpretations of the cited Acts.

Regarding the FOIA, its basic objective is to disclose official information, making available to the public Federal agency records (5 U.S.C. 552(a)), except to the extent that such records (or portions thereof) are specifically exempt from disclosure (5 U.S.C. 552(b)). Thus, contrary to the commenter's position, the FOIA does not mandate nondisclosure, but rather seeks to establish workable standards for determining whether particular material may be withheld or must be disclosed.

Regarding the Trade Secrets Act, this Act specifically prohibits the disclosure of confidential information, except as is authorized by law, under penalty of fine and/or imprisonment (*see also*, § 103.34 of the Customs Regulations (19 CFR 103.34)). As explained below, Customs has revised § 133.22(b) so that no trade secret information will be disclosed at the detention stage. However, at the seizure stage, Customs believes that statutory authority exists to provide Customs with the authority to disclose the information specified. Therefore, Customs believes that substantive agency regulations, promulgated pursuant to such statutory authority and published in compliance with the Administrative Procedure Act (5 U.S.C. 551 *et seq.*), are not in conflict with the Trade Secrets Act.

Concerning Customs' statutory authority to disclose certain importation information to IPR holders, numerous provisions in titles 15, 17, and 19 of the U.S. Code authorize the Secretary of the Treasury (the Secretary) to promulgate regulations to enforce their prohibitions against the importation of IPR-infringing merchandise. The Copyright Act of 1976 (17 U.S.C. 602 *et seq.*)(the Copyright Act) prohibits the importation of infringing copies and authorizes the Secretary to prescribe a procedure whereby a person with an interest in the work may be entitled to notification of the importation. Further, section 603 of the Copyright Act authorizes the Secretary to enforce the Copyright Act's provisions by prohibiting such importations. and provides that (1) a court order may be obtained enjoining an importation and (2) a claimant seeking exclusion of an importation may establish proof that an importation would violate section 602. Such order or proof would necessarily entail the availability of certain transaction information to the person claiming an interest in the copyright.

Under the Lanham Trademark Act (15 U.S.C. 1124), the Secretary is authorized to make regulations regarding trademarks and to aid Cus-

toms officers in enforcing the prohibitions against importation. Also, sections 526 and 595a(c) of the Tariff Act of 1930, as amended (19 U.S.C. 1526 and 1595a(c)), prohibit the importation or introduction of merchandise with unauthorized trademarks or merchandise or packaging in which copyright, trade mark, or trade name protection violations are involved and under the provisions of section 624 of the Tariff Act of 1930, as amended (19 U.S.C. 1624), the Secretary is authorized to promulgate regulations to carry out those provisions. Section 526 of the Tariff Act of 1930, as amended, further provides for the notification of trademark owners when merchandise bearing a counterfeit mark is seized. Customs believes that these statutes may be reasonably interpreted to permit Customs to provide for the disclosure of certain import information, and where the identification of such violative merchandise requires the assistance of IPR owners, relevant information may be made available.

Since the purpose of these disclosure regulations is to further the statutory enforcement scheme by allowing Customs to release certain commercial information so that Customs can more timely and accurately identify legitimate merchandise, pursuant to the regulations promulgated herein, Customs is authorized by law to disclose such information without violating the Trade Secrets Act. Accordingly, since the regulations do not provide for the disclosure of either the manufacturer or importer's identity at the detention stage, no trade secrets are being divulged. As stated in the revised Notice of Proposed Rulemaking, it is Customs policy to avail itself of any opportunity to gather information quickly and accurately so that decisions concerning imported merchandise can be correctly and timely made. Accordingly, the provisions of §§ 133.22 and 133.43, which pertain to detention, do not provide for the disclosure of any manufacturer or importer information, while the provisions of §§ 133.23a and 133.42, which pertain to seizure, are revised to allow for the disclosure of the name and address information pertaining to the manufacturer and importer.

Further, to make clear when Customs officers will be required to disclose importation information and provide sample merchandise to IPR owners and when Customs officers may, on an *ad hoc* basis, disclose such information, *i.e.*, to solicit an IPR owner's assistance in determining whether a particular importation should be detained in the first instance, the provisions of § 133.22(b) are revised to better reflect Customs detention notice policies. Accordingly, § 133.22(b) has been amended to provide that once a notice of detention is issued, Customs officers are required to disclose the importation information to IPR owners, within the 30-day time limitation imposed by the detention statute, in order to more quickly determine whether the marks are restricted or prohibited. But during the time between presentation of the goods for Customs examination and issuance of a formal detention notice Customs officers have the authority to disclose such importation information where the circumstances warrant. Customs expects that

such disclosure will allow Customs officers, in many cases, to determine immediately whether a formal detention should be initiated or whether the goods should be released, thereby avoiding lengthy delays and demurrage charges.

For the above reasons, Customs will not withdraw its revised notice.

2. *Disclosure of confidential importer information to the IPR holder is contrary to the intent of both the NAFTA and the GATT:*

Comment:

The same commenter suggested that the proposed disclosure was contrary to the intent of both the NAFTA and the GATT. Citing the NAFTA as providing that it does not affect U.S. law or practice relating to parallel importation of products protected by intellectual property rights and the GATT as stating that measures and procedures to enforce property rights should not themselves become barriers to legitimate trade, the commenter states that the proposed changes cannot be said to be consistent with the stated objectives of these two agreements. The commenter states that Customs' proposal is principally directed at changing established law and practice relating to parallel imports and will inevitably serve as a barrier to legitimate trade. Accordingly, the commenter recommends that Customs withdraw its revised notice.

Customs' Response:

Inasmuch as the proposed regulations provide for disclosure as authorized by law, Customs does not believe that such disclosure is inconsistent with either the NAFTA or the GATT TRIPs Agreement. The border enforcement provisions of these Agreements contemplate the prosecution of suspect importations by IPR owners. To that end, each Agreement provides for the disclosure of information to IPR owners sufficient to substantiate claims of infringement. Article 1718 of the NAFTA and Article 57 of the GATT TRIPs Agreement do not, as the commenter suggests, give blanket nondisclosure benefit to the importer. Customs believes that the references in these Agreements to the "protection of confidential information" require only that the disclosure of information comply with the respective signatory party's laws and regulations regarding disclosure. For the reasons discussed above in the previous response, the proposed regulations, have been issued pursuant to valid statutory authority.

Accordingly, Customs will not withdraw its revised notice.

3. *The 30-day notification period does not allow the IPR owner to act expeditiously:*

Comment:

Another commenter urged that the 30-day notification period should be reduced to 10 days so that an IPR owner could be in a position to act more expeditiously, and recommends that Customs change the time period accordingly.

Customs' Response:

Aside from the permissive disclosure situation described above, Customs believes that the 30 business day time limit for required disclosure of importation information affords IPR owners sufficient time to act expeditiously. Customs must consider the workload placed on its employees and regulate manageable time frames for their compliance with the relevant disclosure rules.

Accordingly, Customs will not change the time period as proposed in §§ 133.22(b), 133.23(c), 133.42(d), and 133.43(b).

4. *Disclosure should include country of origin information:*

Comment:

Several comments were received noting that country of origin information should be included in the revision of 19 CFR 133.43, as it was in the other sections revised.

Customs' Response:

Customs agrees that the regulations should be consistent and has added country of origin information as information to be disclosed under 19 CFR 133.43.

5. *Disclosure should include the date(s) of importation, the port of entry, and a description of the merchandise:*

Comment:

In the Background section of the revised Notice of Proposed Rulemaking Customs indicated that certain information, namely dates of importation, port of entry and description of the merchandise, would be included in every notification as a matter of course. One commenter requested that these items be specifically set forth to insure that this information is released.

Customs' Response:

Customs agrees and has added this information concerning the dates of importation, port of entry, and a description of the merchandise as information to be disclosed under §§ 133.22(b), 133.23(c), 133.42(d), and 133.43(b).

6. *Disclosure should include the identity of the importer:*

Comment:

Comments were received requesting that the identity of the importer be provided under 19 CFR 133.22 when goods are detained for suspicion of trademark counterfeiting. These commenters argue that such disclosure would then parallel the release of an importer's identity under 19 CFR 133.43 when goods are detained for suspicion of copyright counterfeiting.

Customs' Response:

The identity of an importer is provided under the provisions of 19 CFR 133.43 (suspected copyright counterfeiting) because of the

broad bonding provisions contained in that section. The bonding requirements applicable to goods detained for suspicion of trademark counterfeiting are much narrower, only providing security for samples. Although the NAFTA and the GATT TRIPs Agreement each provides that the competent authorities may require such a security for all detentions of goods suspected of IPR infringement, Customs has not implemented such a requirement for trademarked goods.

Customs' objective of making timely and accurate determinations on counterfeiting requires that the unauthorized application of a mark be readily ascertained. To that end, Customs has determined that the identity of the manufacturer is important because the mark is typically applied by the manufacturer. Until Customs institutes a similar, broad bonding procedure for suspected counterfeit trademark goods, it has decided that the importer's identity shall not be released at the time of detention.

7. *IPR owners should be allowed to retain samples sent for inspection, and Customs should clarify its position regarding the testing of samples, since testing may result in the destruction of a sample:*

Comment:

A comment was received suggesting that IPR owners be permitted to retain samples forwarded by Customs for examination. Another comment noted that certain testing may result in the destruction or partial destruction of a sample, and requested clarification of Customs position on the testing of samples.

Customs' Response:

Customs recognizes that testing may be required to determine whether a sample bears a counterfeit trademark or constitutes a piratical copy. Customs' intention is to allow for the manipulation of samples provided to IPR owners, including the destruction of the sample *if required* during the testing procedure. However, Customs has determined that samples may not be retained by IPR owners, and Customs will require either the return of samples, the remains of tested sample, or assurances to Customs' satisfaction that the article has been destroyed. Accordingly, the regulations as set forth below have been modified to provide that where Customs has provided sample merchandise to an IPR owner for examination, testing, or any other use in pursuit of a related private civil remedy, the IPR owner must return the sample to Customs upon demand or at the conclusion of the examination, testing, or use in pursuit of a related private civil remedy. In the event the sample is damaged, destroyed, or lost while in the custody of the IPR owner, the owner shall certify this fact to Customs. The regulations also require that the IPR owner post a bond conditioned to indemnify the importer and to hold harmless Customs, in the event that the sample is destroyed.

In the August 23, 1993, notice of proposed rulemaking, and the July 14, 1995, revised notice of proposed rulemaking on these regulations,

Customs proposed furnishing samples of imported goods bearing trademarks to IPR owners to determine whether infringement has occurred. Customs has determined that in some instances samples may be furnished to IPR owners under the proposed rules where subsequently it is determined that no infringement has occurred. It logically flows that in some of these instances importers may suffer damages as a result of the furnishing of samples to the IPR owner (for example, samples may be lost or destroyed). To provide protection to importers in this eventuality, Customs has determined to require IPR owners to provide Customs with a bond as a precondition to obtaining samples. Specifically, Customs has revised §§ 133.22(c), 133.23a(d), 133.42(e), and 133.43(b) and (c) to require that a bond be posted by the IPR owner to indemnify the importer and hold-harmless Customs from any loss or damage resulting from Customs furnishing a sample to the IPR owner, in the event that the sample merchandise provided is subsequently determined not to bear an infringing mark.

CONCLUSION

After analysis of the comments and further consideration of the matter, Customs has decided to adopt the proposed amendments to Part 133 of the Customs Regulations with the modifications discussed above in the analysis of comments.

THE REGULATORY FLEXIBILITY ACT

Based on the reasons set forth above and because the regulatory burden falls primarily on Customs to notify IPR holders of infringing imported merchandise, pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), it is certified that the amendments to the regulations will not have a significant economic impact on a substantial number of small entities. Accordingly, the amendments are not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

EXECUTIVE ORDER 12866

This document does not meet the criteria for a "significant regulatory action" as defined in E.O. 12866.

LIST OF SUBJECTS IN 19 CFR PART 133

Copyright, Counterfeit goods, Customs duties and inspection, Imports, Reporting and recordkeeping requirements, Restricted merchandise, Seizures and forfeitures, Trademarks, Trade names.

AMENDMENTS TO THE REGULATIONS

For the reasons stated above, part 133 of the Customs Regulations (19 CFR part 133), is amended as set forth below:

PART 133—TRADEMARKS, TRADE NAMES, AND COPYRIGHTS

1. The general authority citation for part 133 is revised to read as follows:

Authority: 17 U.S.C. 101, 601, 602, 603; 19 U.S.C. 66, 1624; 31 U.S.C. 9701.

* * * * * * *

2. Section 133.22 is amended by revising the section heading; revising the text of paragraph (a); redesignating paragraphs (b) and (c) as paragraphs (d) and (e); adding new paragraphs (b) and (c); and revising the heading of newly redesignated paragraph (d). The additions and revisions are to read as follows:

§ 133.22 Procedure on detention of articles subject to restriction.

(a) *In general.* Articles subject to the restrictions of § 133.21 shall be detained for 30 days from the date on which the merchandise is presented for Customs examination. * * *

The importer shall be notified of the decision to detain within 5 days of the decision that such restrictions apply. The importer may, during the 30-day period, establish that any of the circumstances described in § 133.21(c) are applicable. Extensions of the 30-day time period may be freely granted for good cause shown.

(b) *Notice of detention and disclosure of information.* From the time merchandise is presented for Customs examination until the time a notice of detention is issued Customs may disclose to the owner of the trademark or trade name any of the following information in order to obtain assistance in determining whether an imported article bears an infringing trademark or trade name. Customs shall disclose this same information (if available) to the owner of the trademark or trade name within 30 days (excluding weekends and holidays) of the date of detention:

(1) The date of importation;
(2) The port of entry;
(3) A description of the merchandise;
(4) The quantity involved; and
(5) The country of origin of the merchandise.

(c) *Samples available to the trademark or trade name owner.* At any time following presentation of the merchandise for Customs examination but prior to seizure, Customs may provide a sample of the suspect merchandise to the owner of the trademark or trade name for examination or testing to assist in determining whether the article imported bears an infringing trademark or trade name. To obtain a sample under this section, the trademark/trade name owner must furnish Customs a bond in the form and amount specified by the port director, conditioned to hold the United States, its officers and employees, and the importer or owner of the imported article harmless from any loss or damage resulting from the furnishing of a sample by Customs to the trademark

owner. Customs may demand the return of the sample at any time. The owner must return the sample to Customs upon demand or at the conclusion of the examination or testing. In the event that the sample is damaged, destroyed, or lost while in the possession of the trademark or trade name owner, the owner shall, in lieu of return of the sample, certify to Customs that: "The sample described as [insert description] and provided pursuant to 19 CFR 133.22(c) was (damaged/destroyed/lost) during examination or testing for trademark infringement."

(d) *Form of notice.* * * *

* * * * * * *

3. Section 133.23a is amended by redesignating paragraph (c) as paragraph (e); adding new paragraphs (c) and (d); and revising the heading and removing the first sentence of newly designated paragraph (e). The additions and revisions are to read as follows:

§ 133.23a Articles bearing counterfeit trademarks.

* * * * * * *

(c) *Notice to trademark owner.* When merchandise is seized under this section, Customs shall disclose to the owner of the trademark the following information, if available, within 30 days, excluding weekends and holidays, of the date of the notice of seizure:

(1) The date of importation;
(2) The port of entry;
(3) A description of the merchandise;
(4) The quantity involved;
(5) The name and address of the manufacturer;
(6) The country of origin of the merchandise;
(7) The name and address of the exporter; and
(8) The name and address of the importer.

(d) *Samples available to the trademark owner.* At any time following seizure of the merchandise, Customs may provide a sample of the suspect merchandise to the owner of the trademark for examination, testing, or other use in pursuit of a related private civil remedy for trademark infringement. To obtain a sample under this section, the trademark/trade name owner must furnish Customs a bond in the form and amount specified by the port director, conditioned to hold the United States, its officers and employees, and the importer or owner of the imported article harmless from any loss or damage resulting from the furnishing of a sample by Customs to the trademark owner. Customs may demand the return of the sample at any time. The owner must return the sample to Customs upon demand or at the conclusion of the examination, testing, or other use on pursuit of a related private civil remedy for trademark infringement. In the event that the sample is damaged, destroyed, or lost while in the possession of the trademark owner, the owner shall in lieu of return of the sample, certify to Customs that: "The sample described as [insert description] and provided pursuant to 19 CFR 133.23a(d) was (damaged/destroyed/lost) during examination, testing, or other use."

(e) *Failure to make appropriate disposition.* * * *

4. Section 133.42 is amended by redesignating paragraph (d) as paragraph (f) and adding new paragraphs (d) and (e) to read as follows:

§ 133.42 Infringing copies or phonorecords.

* * * * * * *

(d) *Disclosure.* When merchandise is seized under this section, Customs shall disclose to the owner of the copyright the following information, if available, within 30 days, excluding weekends and holidays, of the date of the notice of seizure:

(1) The date of importation;
(2) The port of entry;
(3) A description of the merchandise;
(4) The quantity involved;
(5) The name and address of the manufacturer;
(6) The country of origin of the merchandise;
(7) The name and address of the exporter; and
(8) The name and address of the importer.

(e) *Samples available to the copyright owner.* At any time following seizure of the merchandise, Customs may provide a sample of the suspect merchandise to the owner of the copyright for examination, testing, or any other use in pursuit of a related private civil remedy for copyright infringement. To obtain a sample under this section, the copyright owner must furnish to Customs a bond in the form and amount specified by the port director, conditioned to hold the United States, its officers and employees, and the importer or owner of the imported article harmless from any loss or damage resulting from the furnishing of a sample by Customs to the copyright owner. Customs may demand the return of the sample at any time. The owner must return the sample to Customs upon demand or at the conclusion of the examination, testing, or other use in pursuit of a related private civil remedy for copyright infringement. In the event that the sample is damaged, destroyed, or lost while in the possession of the copyright owner, the owner shall, in lieu of return of the sample, certify to Customs that: "The sample described as [insert description] provided pursuant to 19 CFR 133.42(e) was (damaged/destroyed/lost) during examination, testing, or other use."

* * * * * * *

5. In § 133.43, paragraphs (c) and (d) are redesignated as paragraphs (d) and (e), and paragraph (b) is revised and a new paragraph (c) is added to read as follows:

§ 133.43 Procedure on suspicion of infringing copies.

* * * * * * *

(b) *Notice to copyright owner.* If the importer of suspected infringing copies or phonorecords files a denial as provided in paragraph (a) of this section, the port director shall furnish to the copyright owner the fol-

lowing information, if available, within 30 days, excluding weekends and holidays, of the receipt of the importer's denial:

(1) The date of importation;

(2) The port of entry;

(3) A description of the merchandise;

(4) The quantity involved;

(5) The country of origin of the merchandise; and

(6) Notice that the imported article will be released to the importer unless, within 30 days from the date of the notice, the copyright owner files with the port director a written demand for the exclusion from entry of the detained imported articles.

(c) *Samples available to the copyright owner.* At any time following presentation of the merchandise for Customs examination but prior to seizure, Customs may provide a sample of the suspect merchandise to the owner of the copyright for examination or testing to assist in determining whether the article imported is a piratical copy. To obtain a sample under this section, the copyright owner must furnish Customs a bond in the form and amount specified by the port director, conditioned to hold the United States, its officers and employees, and the importer or owner of the imported article harmless from any loss or damage resulting from Customs detention or seizure, or the furnishing of a sample by Customs to the trademark owner, in the event that the Commissioner of Customs, or his designee, or a federal court determines that the article does not bear an infringing mark. Customs may demand the return of the sample at any time. The owner must return the sample to Customs upon demand or at the conclusion of the examination or testing. In the event that the sample is damaged, destroyed, or lost while in the possession of the copyright owner, the owner shall, in lieu of return of the sample, certify to Customs that: "The sample described as [insert description] provided pursuant to 19 CFR 133.43(c) was (damaged/ destroyed/lost) during examination or testing for copyright infringement."

* * * * * * *

SAMUEL H. BANKS,
Acting Commissioner of Customs.

Approved: February 17, 1998.

JOHN P. SIMPSON,
Deputy Assistant Secretary of the Treasury.

[Published in the Federal Register, March 12, 1998 (63 FR 11996)]

19 CFR Parts 19, 101, 146, and 161

(T.D. 98–22)

RIN 1515–AC02

GENERAL ENFORCEMENT PROVISIONS; REMOVAL OF AGENCY MANAGEMENT REGULATIONS

AGENCY: Customs Service, Treasury.

ACTION: Final rule.

SUMMARY: This document revises the Customs Regulations by: (1) removing several general enforcement provisions relating to Customs management that do not serve to inform the public of any requirements; (2) relocating a general enforcement provision concerning Customs supervision from one part of the regulations to a different part of the Customs Regulations, and (3) consolidating certain other general enforcement provisions. These amendments are made as part of Customs continuing effort to ensure that its regulations are informative, clear, and necessary.

EFFECTIVE DATE: March 11, 1998.

FOR FURTHER INFORMATION CONTACT: Harold M. Singer or Gregory R. Vilders, Office of Regulations and Rulings, (202) 927–2340.

SUPPLEMENTARY INFORMATION:

BACKGROUND

As part of Customs' continuing effort to ensure that its regulations are informative, clear, and up-to-date, Customs has decided to remove, relocate, or consolidate several general enforcement regulations in Part 161 of the Customs Regulations (19 CFR Part 161).

The regulations being removed do not impose any obligations on the public, but concern matters related to agency procedure and practice. The regulations being removed are the following: (1) § 161.3, which concerns the actions that must be taken by a port director or special agent in charge when there is a customs law violation requiring legal proceedings; and (2) § 161.4, which concerns the responsibility of the agency to refer to the U.S. Attorney's Office a determination that a Customs officer or employee was bribed or offered a bribe.

Four regulations dealing with compensation for informant information concerning fraud are consolidated into two to more clearly inform the public of who may file a claim for compensation and how the claim is processed, since Customs' reorganization in 1995. Accordingly, § 161.11, which authorizes the Secretary of the Treasury to pay an award to certain persons who either detect and seize any vessel, vehicle, merchandise, or baggage subject to seizure and forfeiture and reports

the same to a Customs officer or otherwise furnish original information concerning a fraud perpetrated upon Customs if there is a net recovery from the fraud, is consolidated with § 161.12, which provides that employees or officers of the United States receiving any portion of such informant compensation are subject to criminal prosecution, and § 161.13, which provides that claims for compensation are administratively limited and cannot exceed the statutory ceiling, is consolidated with § 161.16, which concerns the filing of claims for informant compensation.

Section 161.1, which pertains to Customs' general supervision authority, more properly belongs in the general provisions of the Customs Regulations at Part 101. Accordingly, this regulatory provision is being relocated to Part 101, where it is designated as paragraph (c) to § 101.2, and the text is revised for clarity.

Section 161.0 is revised to account for these changes and conforming referencing changes are made to provisions at §§ 19.4, 19.29, 19.38(a), and 146.3(b).

INAPPLICABILITY OF PUBLIC NOTICE AND COMMENT REQUIREMENTS, THE REGULATORY FLEXIBILITY ACT, AND EXECUTIVE ORDER 12866

The amendments to 19 CFR 161.1, 161.3, and 161.4 pertain solely to matters relating to rules of agency procedure and practice. Therefore, pursuant to 5 U.S.C. 553(a)(2), notice and public procedure thereon are inapplicable. The agency for good cause finds notice and public procedure for the amendments to 19 CFR 161.11, 161.12, 161.13, and 161.16 are unnecessary because there has been no substantive change in the regulations. Since this document is not subject to the notice and public procedure requirements of 5 U.S.C. 553, it is not subject to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). This document does not meet the criteria for a "significant regulatory action" as specified in E.O. 12866.

LIST OF SUBJECTS

19 CFR Part 19

Customs duties and inspection, Exports, Freight, Imports, Licensing, Reporting and recordkeeping requirements, Warehouses.

19 CFR Part 101

Customs duties and inspection, Customs ports of entry, Exports, Foreign trade statistics, Imports, Organization and functions (Government agencies), Reporting and recordkeeping requirements, Seals and Insignia, Shipments.

19 CFR Part 146

Customs duties and inspection, Entry, Exports, Foreign trade zones, Imports, Penalties, Reporting and recordkeeping requirements.

19 CFR Part 161

Customs duties and inspection, Exports, Imports, Law enforcement.

AMENDMENTS TO THE REGULATIONS

For the reasons stated above, parts 19, 101, 146, and 161 of the Customs Regulations (19 CFR parts 19, 101, 146, and 161) are amended as set forth below:

PART 19—CUSTOMS WAREHOUSES, CONTAINER STATIONS AND CONTROL OF MERCHANDISE THEREIN

1. The general authority citation for part 19 continues to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1202 (General Note 20, Harmonized Tariff Schedule of the United States), 1624.

* * * * * * *

2. Sections 19.4, 19.29, and 19.38(a) are amended by removing the reference to "§ 161.1" and adding in its place "§ 101.2(c)".

PART 101—GENERAL PROVISIONS

1. The general authority citation for part 101 is revised to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 2, 66, 1202 (General Note 20, Harmonized Tariff Schedule of the United States), 1623, 1624, 1646a.

* * * * * * *

2. Section 101.2 is amended by adding a new paragraph (c) to read as follows:

§ 101.2 Authority of Customs officers.

* * * * * * *

(c) *Customs supervision.* Whenever anything is required by the regulations in this chapter or by any provision of the customs or navigation laws to be done or maintained under the supervision of Customs officers, such supervision shall be carried out as prescribed in the regulations of this chapter or by instructions from the Secretary of the Treasury or the Commissioner of Customs in particular cases. In the absence of a governing regulation or instruction, supervision shall be direct and continuous or by such occasional verification as the principal Customs field officer shall direct if such officer shall determine that less intensive supervision will ensure proper enforcement of the law and protection of the revenue. Nothing in this section shall be deemed to warrant any failure to direct and furnish required supervision or to excuse any failure of a party in interest to comply with prescribed procedures for obtaining any required supervision.

PART 146—FOREIGN TRADE ZONES

1. The authority citation for part 146 continues to read as follows:

Authority: 19 U.S.C. 66, 81a–81u, 1202 (General Note 20, Harmonized Tariff Schedule of the United States), 1623, 1624.

2. Section 146.3(b) is amended by removing the reference to "§ 161.1" and adding in its place "§ 101.2(c)".

PART 161—GENERAL ENFORCEMENT PROVISIONS

1. The general authority citation for Part 161 is revised to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1600, 1619, 1624.

* * * * * * *

2. Section 161.0 is revised to read as follows:

§ 161.0 Scope.

This part provides general information concerning Customs enforcement of certain import and export laws administered by other federal agencies, the filing of offers in compromise of government claims, the eligibility of individuals for informant compensation, and the filing of claims for informant compensation.

3. Sections 161.1, 161.3, 161.4, 161.11, and 161.13 are removed.

4. Section 161.12 is revised to read as follows:

§ 161.12 Eligibility for compensation.

In accordance with section 619, Tariff Act of 1930, as amended (19 U.S.C. 1619), any person not an employee or officer of the United States who either furnishes original information concerning any fraud upon the customs revenue or any violation, perpetrated or contemplated, of the customs or navigation laws or any other laws administered or enforced by Customs, or detects and seizes any item subject to seizure and forfeiture under the customs or navigation laws or other laws enforced by Customs and reports the same to a Customs officer, may file a claim for compensation, provided there is a net amount recovered from such detection and seizure or such information, unless other laws specify different procedures. Any employee or officer of the United States who receives, accepts, or contracts for any portion of such compensation, either directly or indirectly, is subject to criminal prosecution and civil liability as provided by 19 U.S.C. 1620.

5. Section 161.16 is revised to read as follows:

§ 161.16 Filing a claim for informant compensation.

(a) *Limitations on claims.* Pursuant to 19 U.S.C. 1619, an informant may be paid up to twenty-five percent of the net recovery to the government from duties withheld; from any fine (civil or criminal), forfeited bail bond, penalty, or forfeiture incurred; or, if the forfeiture is remitted, from the monetary penalty recovered for remission of the forfeiture. The amount of the award paid to informants shall not exceed $250,000 for any one case, regardless of the number of recoveries that result from the information furnished; however, no claim of less than $100 will be paid.

(b) *Filing of claim.* A claim shall be filed, in duplicate, on Customs Form 4623 with the Special Agent in Charge, who shall make a recommendation on the form as to approval and the amount of the award. The Special Agent in Charge shall forward the form to the port director, who shall make a recommendation on the form as to approval and the

amount of the award. The port director shall forward the form to Customs Headquarters for action. If for any reason a claim has not been transmitted by the port director, the claimant may apply directly to Customs Headquarters.

SAMUEL H. BANKS,
Acting Commissioner of Customs.

Approved: February 17, 1998.
JOHN P. SIMPSON,
Deputy Assistant Secretary of the Treasury.

[Published in the Federal Register, March 11, 1998 (63 FR 11825)]

(T.D. 98–23)

REVOCATION OF CUSTOMS BROKER LICENSE

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Broker license revocation.

Notice is hereby given that the Commissioner of Customs, pursuant to Section 641, Tariff Act of 1930, as amended, (19 U.S.C. 1641), and Parts 111.52 and 111.74 of the Customs Regulations, as amended (19 CFR 111.52 and 111.74), is canceling the following Customs broker licenses without prejudice.

Port	*Individual*	*License #*
New York	Warner Forwarders, Inc.	14042
New York	Columbia Shipping Inc.	04416
Chicago	Columbia Shipping Inc.	12462
Los Angeles	Columbia Shipping Inc.	06300
New York	Laufer Shipping Co., Inc.	02972
New York	Automated Cargo Corp.	11494
Los Angeles	Sheung Yip Lee, dba YSL Customs Broker	12365
Los Angeles	James G. Wiley	01892
Los Angeles	Charles Chow	06004
Los Angeles	Debra Marie Swanson	06474
Los Angeles	First Brokerage Int'l Inc.	09487
New York	Automated Cargo Corp.	11494
New York	Cargo Plus Imports, Inc.	13063
Chicago	CHR Green Int'l Co.	13485

Dated: March 10, 1998.

PHILIP METZGER,
Director,
Trade Compliance.

[Published in the Federal Register, March 18, 1998 (63 FR 13301)]

U.S. Customs Service

General Notices

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, March 11, 1998.

The following documents of the United States Customs Service, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

STUART P. SEIDEL,
Assistant Commissioner,
Office of Regulations and Rulings.

REVOCATION OF RULING LETTER RELATING TO THE CLASSIFICATION OF A CROCHETED RAFFIA HAT

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of tariff classification ruling letter

SUMMARY: Pursuant to section 625(c)(1) of the Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L 103–182, 107 Star. 2057), this notice advises interested parties that Customs is revoking New York Ruling Letter (NY) B88793, dated September 8, 1997, concerning the tariff classification of a crocheted raffia hat from China under heading 6506 of the Harmonized Tariff Schedule of the United States Annotated (HTSUSA). Notice of the proposed revocation was published on January 2, 1998, in the CUSTOMS BULLETIN, Volume 32, No. 1.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after May 26, 1998.

FOR FURTHER INFORMATION CONTACT: Rebecca A. Hollaway, Commercial Rulings Division (202) 927–2379.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On January 2, 1998, Customs published in the CUSTOMS BULLETIN, Volume 32, No. 1, a notice of a proposal to revoke NY B88793, dated Sep-

tember 8, 1998. In that ruling, Customs classified a crocheted raffia hat under subheading 6506.99.0000, HTSUSA, as other headgear.

Customs received more than eighty comments opposing the proposed revocation of NY B88793, classifying the hat under subheading 6506.99.0000. No comments were received in favor of the change. Basically, the comments opposed classification of the hat under heading 6505 because they believe that provision pertains exclusively to textile headgear. Secondly, they argued that heading 6505 only covers knit to shape products or products which are ready for use as a result of the knitting or crocheting processes, and the raffia hat must be blocked to shape using heat and pressure. Finally, the comments oppose classification in heading 6505 because that provision contains textile restrictions and the material from which the finished article is made is not a textile material. One comment states that the hat was not knit or crocheted. If Customs disagrees that the hat is classifiable under heading 6506, all of the comments alternatively seek classification under heading 6504, as plaited headgear. Our response to these comments are addressed in Headquarters Ruling Letter (HQ) 961026.

Pursuant to section 625(c)(1) of the Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs revokes NY B88793 dated September 8, 1997. HQ 961026 revoking NY B88793 is set forth in the attachment to this document.

Publication of rulings or decisions pursuant to 19 U.S.C. 1625 does not constitute a change of practice or position in accordance with 177.10(c)(1), of the Customs Regulations (19 CFR 177.10(c)(1)).

Dated: March 9, 1998.

JOHN E. ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, March 9, 1998.

CLA–2 RR:CR:TE 961026 RH
Category: Classification
Tariff No. 6505.90.9075

MR. STEPHEN S. SPRAITZAR
GEORGE R. TUTTLE LAW OFFICES
Three Embarcadero Center, Suite 1160
San Francisco, CA 94111

Re: Revocation of New York Ruling Letter B88793, dated September 8, 1997; classification of a crocheted raffia hat from China; heading 6504; heading 6505; heading 6506.

DEAR MR. SPRAITZAR:

On September 8, 1997, Customs issued New York Ruling Letter (NY) B88793, addressed to you on behalf of Dorfman, concerning the classification of a crocheted hat from China. In that ruling, Customs classified the hat under subheading 6506.99.0000 of the Harmonized Tariff Schedule of the United States Annotated (HTSUSA), as other headgear.

Pursuant to section 625(c)(1) of the Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), notice of the proposed revocation of NY B88793 was published on January 2, 1998, in the CUSTOMS BULLETIN, Volume 32, No. 1.

In the proposed ruling, Customs classified the raffia hat under subheading 6505.90.9095, HTSUSA, as a crotched hat or other headgear, which requires textile category 859. However, a new statistical provision (6505.90.9075) became effective March 1, 1998, which eliminates the applicability of quota, visa, or textile restraints to the instant merchandise.

Facts:

NY B88793 describes the merchandise as follows:

> The submitted sample, style L551, a hat with a brim, is stated to be made from crocheted raffia. On the inside is sewn a fabric sweatband. A close examination of the raffia used in the construction of the hat revealed that the 'yarns' are unspun raffia that are crocheted into a hat body and then blocked to form a brim. These 'yarns' are not considered vegetable fiber yarns of headings 5306–5308 as these yarns must be spun and to be considered spun must have been 1. broken down into fine parallel fibers, commonly known as tow, rovings or silver; 2. carded, combed, or aligned in parallel fashion in some manner, and 3. caused to adhere to each other by means of spinning or twisting. The raffia used in the article at issue has not been subjected to this process.

Issue:

What is the correct classification of the crocheted raffia hat?

Law and Analysis:

Classification of goods under the HTSUSA is governed by the General Rules of Interpretation (GRIs). GRI 1 provides that classification shall be determined according to the terms of the headings and any relative section or chapter notes, taken in their appropriate order.

The provisions in issue are (1) subheading 6504.00, HTSUSA, which provides for hats and other headgear, plaited or made by assembling strips of any material; (2) subheading 6505.90.9075, HTSUSA, which provides for raffia hats and other headgear, knitted or crocheted, or made up from lace, felt or other textile fabric; and (3) subheading 6506.99, HTSUSA, which provides for headgear not elsewhere provided for.

Heading 6506 covers other headgear, whether or not lined or trimmed. The EN to heading 6506 states that the heading also covers safety headgear (e.g., for sporting activities, military or fireman's helmets, motor-cyclists', miners' or construction workers' helmets), whether or not fitted with protective padding or, in the case of certain helmets, with microphones or earphones. It also covers headgear of rubber or plastics (e.g., bathing caps, hoods), headgear of leather, fur skin, feathers, artificial flowers and metal.

Although heading 6506 provides for a broad array of headgear, the hat under consideration is more specifically described in heading 6505, HTSUSA. That heading encompasses:

> Hats and other headgear, knitted or crocheted or made up from lace, felt or other textile fabric, in the piece (but not in strips), whether or not lined or trimmed; hair-nets of any material, whether or not lined or trimmed.

The Explanatory Notes (EN) to the HTSUSA constitute the official interpretation of the tariff at the international level. While not legally binding, they represent the considered views of classification experts of the Harmonized System Committee. Thus, it has been the practice of the Customs Service to follow, whenever possible, the terms of the Explanatory Notes when interpreting the HTSUSA. The EN to Chapter 65 state, in part, that:

> [T]his Chapter covers hat-shapes, hat-forms, hat bodies and hoods, and hats and other headgear of all kinds, **irrespective of the materials of which they are made** and of their intended use (daily wear, theatre, disguise, protection, etc.). [Emphasis added].

In this case, the method of manufacturing the hat using a wire to loop the raffia onto itself results in a crochet or knit construction, irrespective of the instruments or materials used in the process.

Moreover, according to the chapter notes the hat may be made of any materials, in this case raffia, and we find nothing in the heading text or notes that precludes blocking or forming the hat to its desired shape. Therefore, the correct classification for the crocheted or knit raffia hat is under subheading 6505.90.9075, HTSUSA.

Heading 6504 encompasses "hats and other headgear, plaited or made by assembling strips of any material, whether or not lined or trimmed." The hat in question does not satisfy the terms of this heading because it is not plaited. Moreover, while the subject headgear is made from strips, crocheting and knitting is not an assembly process.

Holding:

The hat in question is classifiable as a crocheted or knit raffia hat under subheading 6505.90.9075, HTSUSA. It is dutiable at the general column rate of duty at 21.5 cents per kilogram plus 7.8 percent *ad valorem*.

In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to 19 U.S.C. 1625(c)(1) does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10 (c)(1)).

JOHN E. ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

PROPOSED REVOCATION OF RULING LETTERS RELATING TO TARIFF CLASSIFICATION OF WOMEN'S KNIT GARMENTS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed revocation of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke two rulings pertaining to the tariff classification of women's knit garments. Comments are invited on the correctness of the proposed ruling.

DATE: Comments must be received on or before April 24, 1998.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Commercial Rulings Division, 1300 Pennsylvania Avenue, N.W., 3rd floor, Washington, D.C., 20229. Comments may be inspected at the Commercial Rulings Division, Office of Regulations and Rulings, located at the aforementioned address.

FOR FURTHER INFORMATION CONTACT: Ann Segura Minardi, Textiles Branch, (202) 927–1368.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke two rulings pertaining to the tariff classification of women's knit garments. Comments are invited on the correctness of the proposed ruling.

In a ruling from Customs Houston Port, PD A83049, dated May 14, 1996, the article identified as Style 74998, a woman's knit pullover of 65 percent polyester and 35 percent cotton, was held to be classifiable under subheading 6110.30.3055, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), which provides for "Sweaters, pullovers, sweatshirts, waistcoats (vests) and similar articles, knitted or crocheted: Of man-made fibers: Other: Other: Other; Other: Other: Women's or girls'." Ruling PD A83049 is set forth as "Attachment A" to this document.

In Customs New York Ruling (NY) A84529, dated July 5, 1996, Customs classified an article identified as Style LT–1044, a woman's pullover of cotton knit fabric, fully napped inside and consisting of

65 percent polyester and 35 percent cotton, under subheading 6104.43.2010, HTSUSA, the provision for "Women's or girls' suits, ensembles, suit-type jackets, blazers, dresses, skirts, divided skirts, trousers, bib and brace overalls, breeches and shorts (other than swimwear), knitted or crocheted: Dresses: Of synthetic fibers: Other; Women's." NY A84529 is set forth as "Attachment B" to this document.

At this time, Customs has determined that the items identified in the aforementioned rulings as Style 74998 and LT–1044, are properly classified in subheading 6108.32.0010, HTSUSA, as "Women's or girls' slips, petticoats, briefs, panties, nightdresses, pajamas, negligees, bathrobes, dressing gowns and similar articles, knitted or crocheted: Nightdresses and pajamas: Of man-made fibers; Women's." The subject items are designed as large over-sized nightshirts with a shirt-tail effect at the hem and ample stretch and roominess in the collar, shoulder, sleeves, and body of the garment, making the garments more appropriate for a private activity inside the home rather than informal social occasions inside or outside the house. This determination was, in part, based on the recent case of *International Home Textile, Inc. v. United States,* Slip Op. 97–31, March 18, 1997, wherein the court held that in order to be classified as sleepwear, certain loungewear items must share that essential character of being for a "private activity", *e.g.*, sleeping.

Customs intends to revoke rulings PD A83049 and NY A84529 to reflect the proper classification of the subject items under subheading 6108.32.0010, HTSUSA. Before taking this action, consideration will be given to any written comments timely received. Proposed Headquarters Ruling Letter 959843, modifying PD A83049 and NY A84529, is set forth in "Attachment C" to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: March 9, 1998.

JOHN E. ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, May 14, 1996.

CLA–2–61:359:I07:H:CO:CII EA
Category: Classification
Tariff No. 6110.30.3055

MS. GAYLE E. WILLIAMS
SEARS, ROEBUCK AND CO.
3333 Beverly Road
Hoffman Estates, IL 60179

Re: The tariff classification of a woman's knit pullover of man-made fibers from Thailand.

DEAR MS. WILLIAMS:

In your letter dated April 25, 1996, you requested a classification ruling.

Style 74998 is a woman's pullover of heavy 65% polyester/35% cotton knit fabric which is fully napped inside. The 36" long garment features a rib crew neck; long sleeves with rib cuffs; a shirttail hemmed bottom; and an applique with "a cold winter's night" embroidered across the chest.

The applicable subheading for the pullover will be 6110.30.3055, Harmonized Tariff Schedule of the United States (HTS), which provides for sweaters, pullovers, sweatshirts, waistcoats (vests) and similar articles, knitted or crocheted: of man-made fibers: other: other: other, other: other: women's or girls'. The duty rate will be 33.8 percent *ad valorem*.

Style 74998 falls within textile category designation 639. Based upon international textile trade agreements, products of Thailand are subject to quota and the requirement of a visa.

As requested, the sample will be returned.

The designated textile and apparel category may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected. Part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes. To obtain the most current information available, we suggest that you check, close to the time of shipment, the Status Report on Current Import Quotas (Restraint Levels), an internal issuance of the U.S. Customs Service, which is available for inspection at your local Customs office.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported.

PAUL RIMMER,
Port Director,
Houston.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, July 5, 1996.

CLA–2–61:RR:NC:WA:359 A84529
Category: Classification
Tariff No. 6104.43.2010

MS. GAYLE WILLIAMS
SEARS, ROEBUCK AND COMPANY
3333 Beverly Road
Hoffman Estates, IL 60179

Re: The tariff classification of a woman's dress from Thailand.

DEAR MS. WILLIAMS:

In your letter dated June 7, 1996 you requested a tariff classification ruling.

Style number LT–1044 is a woman's dress constructed from 65% polyester, 35% cotton, knit fabric that is napped on the inside surface. The dress extends from the shoulders to well below the knees. You state in your letter that this garment should be a "lounging robe" and that your definition of lounge wear is "merchandise that is worn in the house for comfort and not to be worn outside the home". However, based on its appearance, it will be worn at home, but need not be worn in intimate surroundings. It does not meet the definition of a robe which is a garment worn when undressed, or while dressing. The dress features a round neckline; long sleeves with ribbed cuffs; and a shirt-tail hemmed bottom. You state that the garment will have appliques and embroidery across the chest that reads "a cold winters' night".

Your sample is being returned as requested.

The applicable subheading for the dress will be 6104.43.2010, Harmonized Tariff Schedule or the United States (HAS), which provides for women's dresses, knitted: of synthetic fibers: other. The duty rate will be 16.8% *ad valorem*.

The dress falls within textile category designation 636. Based upon international textile trade agreements this merchandise from Thailand is not subject to quota restraints but is subject to the requirement of a visa.

The designated textile and apparel categories may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected. Part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes. To obtain the most current information available, we suggest that you check, close to the time of shipment, the *Status Report on Current Import Quotas (Restraint Levels)*, an internal issuance of the U.S. Customs Service, which is available for inspection at your local Customs office.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Mike Crowley at 212–466–5852.

ROGER J. SILVESTRI,
Director,
National Commodity Specialist Division.

[ATTACHMENT C]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:TC:TE 959843 ASM
Category: Classification
Tariff No. 6108.32.0010

MS. NANCY FIFE
MANAGER, IMPORT COSTS
SEARS ROEBUCK AND CO.
3333 Beverly Rd., BC 217A
Hoffman Estates, IL 60179

Re: Request for Reconsideration of Women's Knit Garments; Nightwear vs. Outerwear.

DEAR MS. FIFE:

This letter concerns the Request for Reconsideration of PD A83049, May 14, 1996, and New York Ruling (NY) A84529, July 5, 1996, issued for women's pullovers and dresses.

Facts:

Style 74998 is a woman's pullover of 65 percent polyester and 35 percent cotton knit fabric, fully napped inside. The garment is 36 inches long and has a ribbed crewneck, long sleeves with ribbed cuffs, shirttail bottom, as well as appliques on the chest which depict a cap, owl, and snowflake along with the words "a cold winter's night." In Ruling PDA83049, Customs determined that the item was properly classifiable under subheading 6110.30.3055, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), which is the provision for sweaters, pullovers, sweatshirts, waistcoats (vests) and similar articles, knitted or crocheted, of man-made fibers, other, women's or girls.

Style LT–1044 is also designed as a woman's pullover and is constructed of 65 percent polyester and 35 percent cotton knit fabric, fully napped inside. The length is somewhat longer at 48 inches; however, in all other respects, it is identical to Style 74998, described above. In NY A84529, Customs classified the item under subheading 6104.43.2010, HTSUSA, the provision for women's dresses, knit, of synthetic fibers, other.

It is Sears position that both items should be classified as women's knit nightdresses, of man-made fibers under subheading, 6108.31.0010, HTSUSA. Sears contends that the nightshirts would be designed, displayed, and sold in the nightwear/robe/loungewear area of the intimate apparel section of Sears stores. Sears also states that similar articles are advertised and described as "novelty loungers and sleepshirts" in their promotional literature.

Issue:

Whether the proper tariff classification under the HTSUSA for these women's garments is under the provisions for women's knit pullovers and dresses or the provision for women's knit nightdresses.

Law and Analysis:

Classification of goods under the HTSUSA is governed by the General Rules of Interpretation (GRI's). GRI 1 provides that classification shall be determined according to the terms of the headings and any relative section or chapter notes. Merchandise that cannot be classified in accordance with GRI 1 is to be classified in accordance with subsequent GRI's taken in order. The Explanatory Notes to the HTSUSA (ENs), although not dispositive nor legally binding, provide a commentary on the scope of each heading of the HTSUSA and are generally indicative of the proper interpretation of these headings. *See* T.D. 89–80, 54 Fed. Reg. 35127, 35128, (August 23, 1989).

In order to determine whether or not the garments are sleepwear, Customs considers the factors discussed in two decisions of the Court of International Trade. In *Mast Industries, Inc. v. United States*, 9 CIT 549, 552 (1985), aff'd 786 F.2d 1144 (CAFC, April 1, 1986) the Court dealt with the classification of a garment claimed to be sleepwear and cited Webster's Third New International Dictionary which defined "nightclothes" as "garments to be worn to bed." In *Mast*, the court ruled that the garments at issue were manufactured, marketed and advertised as nightwear and were chiefly used as nightwear. Similarly, in *St. Eve International, Inc. v. United States*, 11 CIT 224 (1987), the court ruled that the garments at

issue were manufactured, marketed and advertised as nightwear and were chiefly used as nightwear.

As noted in Customs Headquarter's Ruling (HQ) 957004, November 23, 1994, Customs will typically look to the garment itself as the crucial factor in classifying the merchandise. However, when presented with a garment which is somewhat ambiguous and not clearly recognizable as sleepwear, Customs will consider other factors such as environment of sale, advertising and marketing, recognition in the trade of virtually identical merchandise, and documentation incidental to the purchase and sale of the merchandise, such as purchase orders, invoices, and other internal documentation. These factors are considered in totality and no single factor is determinative of classification, as each of these factors viewed alone may be flawed. Such was the case in *Regaliti, Inc. v. United States*, Slip Op. 29–80, wherein the court upheld Customs classification of the goods as "pants" and viewed plaintiff's characterization of the items as "tights" as self-serving stating that "To avoid pants quota limitations plaintiff must refer to the items as 'tights'."

In the recent case of *International Home Textile, Inc. v. United States*, Slip Op. 97–31, March 18, 1997, the Court of International Trade addressed the issue of whether certain men's garments were properly classified under the provision for cotton pants, shorts and tops or as sleepwear under the HTSUSA. The court held that in order to be classified as sleepwear, certain loungewear items must share that essential character of being for a "private activity", *e.g.*, sleeping. The court also stated that garments classified as sleepwear would be inappropriate for use at "* * * informal social occasions in and around the home, and for other individual, non-private activities in and around the house e.g., watching movies at home with guests, barbequing at a backyard gathering, doing outside home and yard maintenance work, washing the car, walking the dog, and the like."

The garments in question are of a rather heavy sweatshirt type fabric with fleece on the inside which some may find uncomfortably hot for sleeping. However, the design is that of a large over-sized nightshirt with a shirt-tail effect at the hem and ample stretch and roominess in the collar, shoulder, sleeves, and body of the garment. It is our understanding that the garments are not intended to be paired with matching or coordinating leggings/pants/shorts. Although, the subject garments could be used for private activity inside the home, it is not likely that they would be used for informal social occasions in and around the house because the garment design strongly suggests it's use as a nightshirt. In addition, Sears has submitted advertising information which suggests that the garments in question are to be promoted as sleepwear. According to Sears, these items will be displayed and sold in the nightwear/robe/loungewear area of the Intimate Apparel section of Sears stores. Thus, it is our determination that these garments have the essential character of being for the private activity of sleeping.

Holding:

The womens' garments identified as Style 74998 and LT–1044, are classifiable under the provision for "Women's or girls' slips, petticoats, briefs, panties, nightdresses, pajamas, negligees, bathrobes, dressing gowns and similar articles, knitted or crocheted: Nightdresses and pajamas: Of man-made fibers; Women's", subheading 6108.32.0010, HTSUSA, and are dutiable under the general column one rate at 16.6 percent *ad valorem*. The textile category for this provision is 651.

The importer should be advised that due to the changeable nature of the statistical annotation (the ninth and tenth digits of the tariff number) and the restraint (quota/visa) categories, he or she should contact the local Customs office prior to importation of this merchandise to determine the current status of any import restraints or requirements.

The designated textile and apparel category may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available, we suggest that you check, close to the time of shipment, the *Status Report on Current Import Quotas (Restraint Levels)*, an issuance of the U.S. Customs Service, which is updated weekly and is available at your local Customs office.

The following rulings are hereby modified: PD A83049, dated May 14, 1996, and New York Ruling (NY) A84529, dated July 5, 1996.

JOHN DURANT,
Director,
Commercial Rulings Division.

PROPOSED MODIFICATION OF A RULING LETTER PERTAINING TO THE CLASSIFICATION OF YARN

AGENCY: U.S. Customs Service, Department of Treasury.

ACTION: Notice of proposed modification of a tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1) of the Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify a ruling pertaining to the tariff classification of yarn called "Profilen 215/1N."

DATE: Comments must be received on or before April 24, 1998.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Commercial Rulings Division, 1300 Pennsylvania Avenue, NW (Ronald Reagan Building), Washington, D.C. 20229. Comments submitted may be inspected at the Commercial Rulings Division, Office of Regulations and Rulings, located at the same address.

FOR FURTHER INFORMATION CONTACT: Rebecca A. Hollaway, Commercial Rulings Division (202) 927–2379.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1) of the Tariff Act of 1930 (19 U.S.C. 1625(c)(1), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify District Decision (DD) 807399, dated March 27, 1995, pertaining to the tariff classification of yarn.

In DD 807399, Customs incorrectly classified the yarn under subheading 5402.59.0000 of the Harmonized Tariff Schedule of the United States Annotated (HTSUSA), as synthetic filament yarn (other than sewing thread), not put up for retail sale, including synthetic monofilament of less than 67 decitex; other yarn, single, with a twist exceeding 50 turns/m: other. DD 807399 is set forth as "Attachment A" to this document. The correct classification of the yarn is under subheading 5404.90.0000, HTSUSA, as strip and the like of synthetic textile materials of an apparent width not exceeding 5 mm: other.

Before taking this action, we will give consideration to any written comments timely received. Proposed Headquarters Ruling Letter (HQ) 960701 modifying DD 807399 is set forth as "Attachment B" to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.0), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: March 10, 1998.

JOHN E. ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE,
Washington, DC, March 27, 1995.

CLA–2–54:K:C:B4:H12 807399
Category: Classification
Tariff No. 5402.59.0000

MR. RICHARD J. FINN
LENZING PERFORMANCE, INC.
1743 Washington Street
Canton, MA 02021

Re: The tariff classification of PTFE yarns from Austria.

DEAR MR. FINN:

In your letter dated February 22, 1995, you requested a classification ruling.

You submitted a sample of 100% polytetrafluorethylene (PTFE) single synthetic multifilament yarn of 1350 denier with 400 tpm and with a Z twist, in which you call Profilen 215/1N/Natural. We consider this yarn to be dressed. You also ask for a binding ruling on two other products, in which you did not submit samples. Since Profilen 215/1N/Blue is of the same construction as Profilen 215/1N/Natural, except for color, it would be considered the same. However, if you still wish a binding ruling on Profilen 215/3N/Natural, you must submit a new ruling request with a sample. You state that these yarns will be manufactured by Lenzing AG, Film Division in Lenzing, Austria. You also state that the principle use of this highly engineered filament yarn is for sewing of high temperature filter bags for hot gas filtration (filter bag houses for power plants, trash incinerators, and some industrial processes). You contend that these yarns will be imported on 14 ounce (400 gram) cones.

The applicable subheading for both Profilen 215/1N/Natural and Profilen 215/1N/Blue will be 5402.59.0000 of the Harmonized Tariff Schedule of the United States, which provides for synthetic filament yarn (other than sewing thread), not put up for retail sale, including synthetic monofilament of less than 67 decitex; other yarn, single, with a twist exceeding 50 turns/m; other. The duty rate will be 9.8% *ad valorem*.

These yarns fall within textile category designation 606. As products of Austria, this merchandise will not be subject to visa or quota restrictions based upon international textile trade agreements.

This ruling is being issued under the provisions of Section 177 of the Customs Regulations.

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

THOMAS MATTINA,
Area Director,
JFK Airport.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY.
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA-2 RR:TC:TE 960701 RH
Catgegory: Classification
Tariff No. 5404.90.0000

RICHARD J. FINN
N. AMERICAN SALES
1743 Washington Street
Canton, MA 02021

Re: Request for reconsideration of District Decision 807399 (3-27-95); classification of yarns from Austria; heading 5402; heading 5404; strip.

DEAR MR. FINN:

This is in reply to your letter of April 3, 1997, requesting reconsideration of District Decision (DD) 807399, dated March 27, 1995, concerning the classification of yarn called "Profilen 215/1N."

In DD 807399, Customs classified the yarn in question under subheading 5402.59.0000 of the Harmonized Tariff Schedule of the United States Annotated (HTSUSA), as synthetic filament yarn (other than sewing thread), not put up for retail sale, including synthetic monofilament of less than 67 decitex; other yarn, single, with a twist exceeding 50 turns/m: other.

Facts:

The merchandise under review is "Profilen 215/1N" You describe the merchandise in your letter as follows:

> It is a single filament yarn made from a film of tensilized PTFE (polytetrafluorethylene). The film is typically about 30 um thick and is slit into various widths, typically about 3 MM wide. The tape is then twisted about 400 TPM (twists per meter) to produce a single filament yarn or thread.

Issue:

What is the classification of the subject yarn?

Law and Analysis:

Classification of goods under the HTSUSA is governed by the General Rules of Interpretation (GRIs). GRI 1 provides that classification shall be determined according to the terms of the headings and any relative section or chapter notes, taken in their appropriate order. Two headings are at issue in this case. In DD 807399, Customs initially classified the yarn under heading 5402, HTSUSA, which provides for "Synthetic filament yarn (other than sewing thread), not put up for retail sale, including synthetic monofilament of less than 67 decitex."

Heading 5404, HTSUSA, provides for "Synthetic monofilament of 67 decitex or more and of which no cross-sectional dimension exceeds 1mm; strip and the like (for example, artificial straw) of synthetic textile materials of an apparent width not exceeding 5 mm."

Customs forwarded a sample of the yarn to one of its laboratories to be analyzed for fiber content and construction. The findings set forth in Customs Laboratory Report Number 2-97-10640 reveal:

> THE SAMPLE IS COMPOSED OF A POLYTETRAFLUOROETHYELENE STRIP HAVING AN APPARENT WIDTH MEASURING APPROXIMATELY 0.35 MM.

The Explanatory Notes (EN) to Heading 5404, at page 830, read, in pertinent part, as follows:

> (2) Strip and the like, of synthetic textile materials. The strips of this heading are flat, of a width not exceeding 5 mm, either produced as such by extrusion or cut from wider strips or from sheets

Provided their apparent width (i.e., in the folded, flattened, compressed or twisted state) does not exceed 5 mm, this heading also covers:

(i) Strip folded along the length.

(ii) Flattened tubes, whether or not folded along the length.

(iii) Strip, and articles referred to in (i) and (ii) above, compressed or twisted.

If the width (or apparent width) is not uniform, classification is to be decided by reference to the average width.

Generally, Customs laboratory findings concerning technical analysis of merchandise are binding on Customs. See, Customs Directive 009–3820–002 (May 4, 1992) *Guidelines for Customs Employees Regarding Laboratory Reports,* which states, in part, that:

> The laboratory report, once it has been issued, becomes an official document of the U.S. Customs Service and cannot be disregarded for any reason. Under no circumstances should a laboratory report issued by a Customs laboratory be ignored simply because the Customs official does not agree with or understand the contents of the report.

In this case, a Customs laboratory found that the yarn in question is a strip of a width not exceeding 5 mm. Accordingly, we find that the holding set forth in DD 807399 is incorrect. The yarn is classifiable under heading 5404, HTSUSA.

Holding:

The Profilen 215/1N yarn is a strip classifiable in subheading 5404.90.0000, HTSUSA, which provides for, among other things, strip and the like of synthetic textile materials of an apparent width not exceeding 5 mm: Other. It is dutiable at the general column one rate of duty at 3.1 percent *ad valorem*.

JOHN DURANT,
Director,
Commercial Rulings Division.

PROPOSED MODIFICATION OR REVOCATION OF RULING LETTERS RELATING TO TARIFF CLASSIFICATION OF BELL-SHAPED AND SIMILARLY SHAPED GLASSWARE

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed modification or revocation of tariff classification ruling letters.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub.L. 103–182, 107 Stat. 2057, 2186), this notice advises interested parties that Customs intends to modify one ruling pertaining to the tariff classification under Harmonized Tariff Schedule of the United States (HTSUS) of flower pot-shaped glassware and revoke six rulings pertaining to bell-shaped and similarly shaped glassware, the latter imported with metal stands or pedestals. Each of the rulings to be modified or revoked held that the merchandise is classifiable as candle holders in subheading 9405.50.40, HTSUS; the proposed classification is as other decorative glassware under subheading 7013.99, HTSUS.

DATE: Comments must be received on or before April 24, 1998.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings:

Commercial Rulings Division, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229. Comments submitted may be inspected at the same address.

FOR FURTHER INFORMATION CONTACT: Paul G. Hegland, General Classification Branch, Office of Regulations and Rulings (202) 927–1172.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement (NAFTA) Implementation Act (Pub.L. 103–182, 107 Stat. 2057, 2186), this notice advises interested parties that Customs intends to modify or revoke seven rulings pertaining to the tariff classification of certain glassware. Comments are invited on the correctness of the proposed rulings.

HQ 957127 dated May 16, 1995, and HQ 957794 dated October 2, 1995, held that, respectively, certain "flower pot" shaped frosted glass articles and certain articles consisting of bell- or similarly-shaped glass articles and an iron pedestal or holder for the glassware, were classifiable in subheading 9405.50.40, HTSUS, as other non-electrical lamps and lighting fittings not of brass. In New York Ruling Letters (NYRLs) 888716 dated August 20, 1993, 818540 dated February 23, 1996, A80401 dated March 7, 1996, A84166 dated June 28, 1996, and 815064 dated October 17, 1996, Customs determined that articles consisting of, respectively, a wrought iron stand with two bell-shaped glass inserts, wrought iron three-legged pedestals with circular or bell-shaped glass inserts, tripod metal objects with dome or plate-shaped glass vessels or inserts (also involved was a chair-shaped metal candle holder; it is not proposed to modify NY A80401 insofar as this article is concerned), a tripod-shaped metal object with a dome-shaped glass insert, and iron stands with bell or disk-shape glass inserts, were classifiable in subheading 9405.50.40, HTSUS, as non-electrical lamps and lighting fittings. The tariff classification in these rulings was based on a determination that the articles were not principally used for indoor decoration or similar purposes, as described in subheading 7013.99, HTSUS; they were principally used as candle holders and classifiable in subheading 9405.50.40, HTSUS. This determination was made on the basis of the physical characteristics of the articles and, in some cases, advertising literature. HQs 957127 and 957794 and NYRLs 888716, 818540, A80401, A84166, and 815064 are set forth as Attachments A through G, respectively, to this document.

The primary reason given for the determination that the flower pot-shaped articles in HQ 957127 are not principally used for indoor decoration or similar purposes (*i.e.*, "[f]lower pots necessarily have drainage holes") is factually incorrect. Further, the glass vessels or inserts in each of the described rulings do not necessarily have the physical form

of a candle holder (*e.g.*, there is no "spike" at the bottom of the piece of glassware to hold the candle, and the size is greater than that of a standard-sized candle holder (inside diameter of less than 1 inch, depth of approximately 1½ inches), enabling the glassware to be used for other, general decorative purposes). The physical form of these glass vessels or inserts is that of a general purpose article, which could be used to hold potpourri, flowers, or miscellaneous items, as well as candles, similar to the glass vessels in HQ 956048 dated July 7, 1994. Customs has received evidence of use of similarly described glassware to hold potpourri.

The primary factor for determining whether merchandise falls within a particular class or kind of merchandise is the general physical characteristics of the merchandise. In the absence of features in the physical form of the glass vessels or inserts in HQs 957127 and 957794 and NYRLs 888716, 818540, A80401, A84166, and 815064 which indicate that the principal use of the merchandise is to hold a candle, and in the absence of any evidence from the importer with respect to the other principal use criteria for the class or kind of merchandise, Customs intends to modify or revoke those rulings to reflect the proper classification of the articles. In the case of the rulings involving combination metal and glass articles (HQ 957794 and NYRLs 888716, 818540, A80401, A84166, and 815064), the rulings, as modified or revoked, will conclude that the metal and glass articles are composite goods and that the glass portion of the goods imparts the essential character to the merchandise (see General Rule of Interpretation 3(b)). In the case of the flower pot-shaped glassware in HQ 957127, the classification will be in subheading 7013.99.50, HTSUS, as other glassware used for indoor decoration or similar purposes, valued over $0.30 but not more than $3 each. In the case of the glass vessels or inserts and metal stands or pedestals making up composite goods in HQ 957794 and NYRLs 888716, 818540, A80401, A84166, and 815064, the classification will be in subheading 7013.99.40, 7013.99.50, or 7013.99.60, HTSUS, depending on the value of the composite good, as other glassware used for indoor decoration or similar purposes. Before taking this action, consideration will be given to any written comments timely received. Proposed Headquarters Ruling Letters 961222, 961221, 961220, 961223, 961224, 961225, and 961226 modifying HQs 957127 and 957794 and NYRLs 888716, 818540, A80401, A84166, and 815064, respectively, are set forth in attachments H through N, respectively, to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9) will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: March 9, 1998.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY.
U.S. CUSTOMS SERVICE,
Washington, DC, May 16, 1995.

CLA–2 R:C:M 957127 MMC
Category: Classification
Tariff No. 9405.50.40

MR. JOHN M. MOLSBERRY
ROBERT E. LANDWEER & CO., INC.
CUSTOMHOUSE BROKERS
911 Western Avenue, Suite 208
Seattle, WA 98104

Re: NYRL 896081 revoked; glass candle holders, flower pots; principal use; Additional U.S. Rule of Interpretation 1(a); votive; HRLs 956108, 088123, 953016, 088742, 950245, 950426, 089054; non-electrical lamps and lighting fittings; EN 94.05; candlesticks.

DEAR MR. MOLSBERRY:

This is in reference to your letters of July 5, and August 25, 1994, to Customs in New York, on behalf of Design Imports India, requesting reconsideration of New York Ruling Letter (NYRL) 896081 dated April 11, 1994, in which you were advised of the classification of a "flower pot" shaped frosted glass article under the Harmonized Tariff Schedule of the United States (HTSUS). Samples were provided.

In NYRL 896081 you were advised that the subject articles were classified under subheading 7013.99.50, HTSUS, which provides for glassware of a kind used for table, kitchen, toilet, office, indoor decoration or similar purposes (other than that of heading 7010 or 7018) * * * other glassware * * * other * * * other * * * valued over $0.30 but not over $3 each. You believe that they could be considered votive candles, classifiable under subheading 7013.99.35, HTSUS, or, in the alternative, under subheading 9405.50.40, HTSUS, as non-electric lamps and lighting fittings.

Pursuant to section 625(c)(1) Tariff Act of 1930 [19 U.S.C. 1625(c)(1)], as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, (Pub. L. 103–182, 107 Stat. 2057, 2186), notice of the proposed revocation of NYRL 896081 was published April 12, 1995, in the CUSTOMS BULLETIN, Volume 29, Number 15.

Facts:

The articles in question are described as "flower pot vase" candle holders. The samples are made of thin frosted glass and measure approximately 3½" and 2½" high and 2½" in diameter. They are imported packed 6 to a master carton. Colors are unique to each carton.

Issue:

Are the "flower pot vase" articles classifiable as candle holders under subheading 9405.50.40, HTSUS?

Law and Analysis:

The classification of merchandise under the HTSUS is governed by the General Rules of Interpretation (GRI's). GRI 1, HTSUS, states, in part, that "for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes. * * *"

GRI 6 provides that for legal purposes, the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related subheading notes and, *mutatis mutandis*, to the above rules, on the understanding that only subheadings at the same level are comparable. For the purposes of this rule, the relative section, chapter and subchapter notes also apply, unless the context otherwise requires. The competing subheadings under consideration are as follows:

7013.99.35	Glassware of a kind used for table, kitchen, toilet, office, indoor decoration or similar purposes (other than that of heading 7010 or 7018) * * * Other glassware * * * Other * * * Other * * * Votive-candle holders.
7013.99.50	Glassware of a kind used for table, kitchen, toilet, office, indoor decoration or similar purposes (other than that of heading 7010 or 7018) * * *

	Other glassware * * * Other * * * Other * * * Valued over $0.30 but not over $3 each.
9405.50.40	Lamps and lighting fittings including searchlights and spotlights and parts thereof, not elsewhere specified or included; illuminated signs, illuminated nameplates and the like, having a permanently fixed light source, and parts thereof not elsewhere specified or included * * * Non-electrical lamps and lighting fittings * * * Other * * * Other.

Both subheading 7013.99.35 and 7013.99.50, HTSUS, are use provisions. There are two principal types of classification by use:

(1) according to the actual use of the imported article; and
(2) according to the use of the class or kind of goods to which the imported article belongs.

Use according to the class or kind of goods to which the imported article belongs is more prevalent in the tariff schedule. A few tariff provisions expressly state that classification is based on the use of the class or kind of goods to which the imported article belongs. However, in most instances, this type of classification is inferred from the language used in a particular provision. Because both subheadings contain the language "of the kind" and "used for", classification of goods under them are determined by the use of the class or kind of article to which the imported merchandise belongs.

If an article is classifiable according to the use of the class or kind of goods to which it belongs, Additional U.S. Rule of Interpretation 1(a), HTSUS, provides that: [i]n the absence of special language or context which otherwise requires—(a) a tariff classification controlled by use (other than actual use) is to be determined in accordance with the use in the United States at, or immediately prior to, the date of importation, of goods of that class or kind to which the imported goods belong, and the controlling use is the principal use. In other words, the article's principal use at the time of importation determines whether it is classifiable within a particular class or kind.

While Additional U.S. Rule of Interpretation 1(a), HTSUS, provides general criteria for discerning the principal use of an article, it does not provide specific criteria for individual tariff provisions. However, the U.S. Court of International Trade (CIT) has provided factors, which are indicative but not conclusive, to apply when determining whether particular merchandise falls within a class or kind. They include: general physical characteristics, the expectation of the ultimate purchaser, channels of trade, environment of sale (accompanying accessories, manner of advertisement and display), use in the same manner as merchandise which defines the class, economic practicality of so using the import, and recognition in the trade of this use. See: *Kraft, Inc, v. United States*, USITR, 16 CIT 483, (June 24, 1992)(hereinafter *Kraft); G. Heilman Brewing Co. v. United States*, USITR, 14 CIT 614 (Sept. 6, 1990); and *United States v. Carborundum Company*, 63 CCPA 98, C.A.D. 1172, 536 F. 2d 373 (1976), *cert. denied*, 429 U.S. 979.

Because both subheadings 7013.99.35 and 7013.99.50, HTSUS, are use provisions, Additional U.S. Rule of Interpretation 1(a), HTSUS, applies. This necessitates the application of the *Kraft* characteristics to the subject glassware. Application of the characteristics will determine to which class or kind the article belongs; indoor decoration or candle holders. Customs is of the opinion that the physical characteristics of the subject article, as well as the manner in which it is used, prevents it from being described by either subheading 7013.99.35 or 7013.99.50, HTSUS.

We are of the opinion that the subject articles are not principally used as the class or kind of merchandise, namely flower pots for indoor decoration, contemplated by subheading 7013.99.50, HTSUS. Flower pots necessarily have drainage holes either in their bottoms or on their sides. These articles do not. Additionally, their small size and frosted nature is consistent with a candle holder's purpose. Frosted glass will defuse the light from a flame, creating light which appears to have a "softer glow". Furthermore, the samples appear to be made of thin glass, which indicates use as a flower pot may not have been contemplated.

Subheading 7013.99.35, HTSUS, provides for glass votive-candle holders. We have held that the tariff definition of a glass votive-candle holder is a glass candle holder chiefly used in churches, where the candles are burned for devotional purposes. *See*, Headquarters Ruling Letter (HRL) 088123 dated February 25, 1991, HRL 088742 dated April 22, 1991, and HRL 950245 dated December 10, 1991. Additionally, we have held that votive-candle holders are generally of two types, large glasses or "sanctuary lamps" which contain candles that burn for about a week and small glasses which hold candles that burn for a few hours. *See*, HRL 950426 dated June 19, 1992. No evidence has been provided to indicate that the

subject article is principally used in a church or for devotional purposes. Additionally, the subject receptacle is not a sanctuary lamp or a candle holder described in HRL 950426. Moreover, the subject article does not have any physical characteristics (e.g.; screened religious scenes) consistent with a votive-candle holder. Therefore, classification under subheading 7013.99.35, HTSUS, is precluded.

Subheading 9405.50.40, HTSUS, provides for non-electrical lamps and lighting fittings. In understanding the language of the HTSUS, the Harmonized Commodity Description and Coding System Explanatory Notes may be consulted. The Explanatory Notes (EN), although not dispositive, or legally binding, provide a commentary on the scope of each heading of the HTSUS, and are generally indicative of the proper interpretation of the HTSUS. *See* T.D. 89–80, 54 Fed. Reg. 35127, 35128, (August 23, 1989). EN 94.05 (pg. 1581), states that lamps and light fittings of this group can be composed of any material and use any source of light, including candles. In addition, EN 94.05(I)(6) states that this heading covers "* * * in particular candelabra, candlesticks, and candle brackets."

We are of the opinion that the terms "candlestick", "candlestick holder", and "candle holder" are interchangeable. Candle holder has been defined as a candlestick, *Webster's II New Riverside University Dictionary*, pg. 224 (1st ed. 1984), and as a holder for a candle; candlestick, *The Random House Dictionary of the English Language*, pg. 216 (1st Ed. 1983). Candlestick has been defined as a utensil for supporting a candle, whether elaborately made or in the common form of a saucer with a socket in the center, *Webster's New International Dictionary*, pg. 390 (2d ed. 1939). Reference to lexicographic authorities is proper when determining the meaning of a tariff term. *Hasbro Industries, Inc. v. United States*, 703 F. Supp. 941 (CIT 1988), *aff'd*, 879 F.2d 838 (1989); *C.J. Tower & Sons of Buffalo, Inc. v. United States*, 69 CCPA 128, 673 F.2d 1268 (1982).

We have previously held that empty glass candle holders are classified under subheading 9405.50.40, HTSUS, as non-electrical lamps and light fittings. *See*, HRL 953016 dated April 27, 1993, HRL 088742 dated April 22, 1991, and HRL 089054 dated August 2, 1991, which classified glass candle holders as non-electrical lamps and light fittings under subheading 9405.50.40, HTSUS, pursuant to EN 94.05.

Based on the above definitions and rulings, we find that the subject articles are, in fact, candlesticks as the term is used in the ENs. They are principally used in the United States as support for a candle. They are not elaborate, but are of a simple form. Therefore, the articles are properly classified under subheading 9405.50.40, HTSUS, as non-electrical lamps and light fittings. For the reasons set forth in this ruling, NYRL 896081 is revoked.

Holding:

The candle holders are classified under subheading 9405.50.40, HTSUS, as non-electrical lamps and lighting fittings, which is currently subject to the Column 1 duty rate of 7.3 percent *ad valorem*.

NYRL 896081 is revoked. In accordance with 19 U.S.C. 625(c)(1), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to 19 U.S.C. 625(c)(1) does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations [19 CFR 177.10(c)(1)].

MARVIN M. AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE,
Washington, DC, October 2, 1995.

CLA–2 R:C:M 957794 MMC
Category: Classification
Tariff No. 9405.50.40

MR. DANIEL T. PETROSINI
ALPHA INTERNATIONAL
40 Parker Road, Suite 201
Elizabeth, NJ 07207

Re: NYRLs 805879 and 805816 revoked; glass candle holders, decorative glassware; principal use; Additional U.S. Rule of Interpretation 1(a); HRLs 957127, 953016, 088742, 950245, 950426, 089054; non-electrical lamps and lighting fittings; EN 94.05; candlesticks.

DEAR MR. PETROSINI:

This is in reference to your letters of March 30 and 31, 1995, on behalf of Park B. Smith, Ltd., requesting reconsideration of New York Ruling Letters (NYRL) 805879 dated January 23, 1995, and 805816 dated January 31, 1995, in which you were advised of the classification of styles "trilogy" and "tulip" glass and iron articles under the Harmonized Tariff Schedule of the United States (HTSUS). Samples and pictures of each were provided.

In both NYRL 805879 and 805816, you were advised that the subject decorative articles were classified under subheading 7013.99.50, HTSUS, which provides for glassware of a kind used for table, kitchen, toilet, office, indoor decoration or similar purposes (other than that of heading 7010 or 7018) * * * other glassware * * * other * * * other * * * valued over $0.30 but not over $3 each. You believe that they could be considered candle holders, classifiable under subheading 9405.50.40, HTSUS, as non-electric lamps and lighting fittings.

Pursuant to section 625(c)(1) Tariff Act of 1930 [19 U.S.C. 1625(c)(1)], as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, (Pub. L. 103–182, 107 Stat. 2057, 2186), notice of the proposed revocation of NYRL 805879 and 805816 was published, in the August 23, 1995, CUSTOMS BULLETIN, Volume 29, Number 34.

Facts:

Both articles are glass vessels with iron pedestals. The glass vessel portions are made of recycled glass. Color is added to the furnace during firing to create a variety of colors in the glass. The iron portion is handcrafted into various shaped frames to act as a pedestal for the glass vessel. You also suggest that the metal portion can support a candle without the presence of the glass vessel. Submitted marketing literature describes both styles as "Environments decorative lighting". Retail advertising of the articles describe them as "decorative candle holders", "votive candle holders", "iron lighting sets" and "candle holders". The "trilogy" style is a combination of a glass vessel and wrought iron stand. It is imported in 3 sizes; small (5″ high), medium (6″ high) and large (7″ high). The glass portion of the 5″ high "trilogy" sample presented has an interior depth of approximately 3″ and an interior diameter of approximately 1½″.

The "tulip" style is a combination of a frosted colored glass vessel in the shape of a blooming tulip and a green painted iron pedestal. The pedestal has a holder fashioned for the vessel and is connected to a base by an iron rod. The iron rod is shaped to appear to be a flower stem and has protruding leaf shaped iron pieces. The "tulip" style comes in three sizes; small (7″ high), medium (12″ high) and large (16″ high). The glass portion of the "tulip" sample presented has an interior depth of approximately 2½″ and an interior diameter of approximately 2″.

Issue:

Are styles "trilogy" and "tulip" glass and iron articles classifiable as candle holders under subheading 9405.50.40, HTSUS?

Law and Analysis:

The classification of merchandise under the HTSUS is governed by the General Rules of Interpretation (GRI's). GRI 1, HTSUS, states, in part, that "for legal purposes, classifica-

tion shall be determined according to the terms of the headings and any relative section or chapter notes. * * *"

GRI 6 provides that for legal purposes, the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related subheading notes and, *mutatis mutandis*, to the above rules, on the understanding that only subheadings at the same level are comparable. For the purposes of this rule, the relative section, chapter and subchapter notes also apply, unless the context otherwise requires. The subheadings under consideration are as follows:

7013.99.50	Glassware of a kind used for table, kitchen, toilet, office, indoor decoration or similar purposes (other than that of heading 7010 or 7018) * * * Other glassware * * * Other * * * Other * * * Valued over $0.30 but not over $3 each.
9405.50.40	Lamps and lighting fittings including searchlights and spotlights and parts thereof, not elsewhere specified or included; illuminated signs, illuminated nameplates and the like, having a permanently fixed light source, and parts thereof not elsewhere specified or included * * * Non-electrical lamps and lighting fittings * * * Other * * * Other.

Subheading 7013.99.50, HTSUS, is a use provision. There are two principal types of classification by use:

(1) according to the actual use of the imported article; and
(2) according to the use of the class or kind of goods to which the imported article belongs.

Use according to the class or kind of goods to which the imported article belongs is more prevalent in the tariff schedule. A few tariff provisions expressly state that classification is based on the use of the class or kind of goods to which the imported article belongs. Because subheading 7013.99.50, HTSUS, contains the language "of the kind" and "used for", classification of goods under them are determined by the use of the class or kind of article to which the imported merchandise belongs.

When an article is classifiable according to the use of the class or kind of goods to which it belongs, Additional U.S. Rule of Interpretation 1(a), HTSUS, provides that: in the absence of special language or context which otherwise requires—(a) a tariff classification controlled by use (other than actual use) is to be determined in accordance with the use in the United States at, or immediately prior to, the date of importation, of goods of that class or kind to which the imported goods belong, and the controlling use is the principal use. In other words, the article's principal use at the time of importation determines whether it is classifiable within a particular class or kind.

While Additional U.S. Rule of Interpretation 1(a), HTSUS, provides general criteria for discerning the principal use of an article, it does not provide specific criteria for individual tariff provisions. However, the U.S. Court of International Trade (CIT) has provided factors, which are indicative but not conclusive, to apply when determining whether particular merchandise falls within a class or kind. They include: general physical characteristics, the expectation of the ultimate purchaser, channels of trade, environment of sale (accompanying accessories, manner of advertisement and display), use in the same manner as merchandise which defines the class, economic practicality of so using the import, and recognition in the trade of this use. See: *Kraft, Inc, v. United States*, USITR, 16 CIT 483, (June 24, 1992)(hereinafter *Kraft); G. Heilman Brewing Co. v. United States*, USITR, 14 CIT 614 (Sept. 6, 1990); and *United States v. Carborundum Company*, 63 CCPA 98, C.A.D. 1172, 536 F. 2d 373 (1976), *cert. denied*, 429 U.S. 979.

As a general rule, a glass article's physical form will indicate its principal use and thus to what class or kind it belongs. Should, however, an exception arise and an article's physical form does not indicate to what class or kind it belongs or its physical form indicates it belongs to more than one class or kind, Customs considers the other enumerated principal use criteria. Customs is of the opinion that the physical characteristics of both styles, as well as their environment of sale, the expectations of the ultimate purchaser and the manner in which they are used, indicates that they are candle holders for tariff purposes.

We are of the opinion that the subject articles, while having a decorative nature, are not principally dedicated to the use of the class or kind of merchandise contemplated by subheading 7013.99.50, HTSUS. The relatively small size of each glass vessel together with its interior depth and diameter and, in the case of the "tulip" style their frosted nature, are all physical characteristics consistent with a candle holder's purpose. Frosted glass will defuse the light from a flame, creating light which appears to have a "softer glow". Further-

more, submitted catalogs and advertisements indicate that these articles are dedicated to a sole use as a candle holder.

Subheading 9405.50.40, HTSUS, provides for non-electrical lamps and lighting fittings. In understanding the language of the HTSUS, the Harmonized Commodity Description and Coding System Explanatory Notes may be consulted. The Explanatory Notes (EN), although not dispositive, or legally binding, provide a commentary on the scope of each heading of the HTSUS, and are generally indicative of the proper interpretation of the HTSUS. *See* T.D. 89–80, 54 Fed. Reg. 35127, 35128, (August 23, 1989). EN 94.05 (pg. 1581), states that lamps and light fittings of this group can be composed of any material and use any source of light, including candles. In addition, EN 94.05(I)(6) states that this heading covers "* * *in particular candelabra, candlesticks, and candle brackets."

We have previously held that empty glass candle holders are classified under subheading 9405.50.40, HTSUS, as non-electrical lamps and light fittings. *See*, HRL 957127 dated May 16, 1995, HRL 953016 dated April 27, 1993, HRL 088742 dated April 22, 1991, and HRL 089054 dated August 2, 1991, which classified glass candle holders as non-electrical lamps and light fittings under subheading 9405.50.40, HTSUS, pursuant to EN 94.05.

Based on the above definitions and rulings, we find that the subject articles are, in fact, candlesticks as the term is used in the ENs. They are principally used in the United States as support for a candle. Therefore, the articles are properly classified under subheading 9405.50.40, HTSUS, as non-electrical lamps and light fittings. For the reasons set forth in this ruling, NYRLs 805879 and 805816 are revoked.

Holding:

The candle holders are classified under subheading 9405.50.40, HTSUS, as non-electrical lamps and lighting fittings, which is currently subject to the Column 1 duty rate of 7.3 percent *ad valorem*.

NYRLs 805879 dated January 23, 1995, and 805816 dated January 31, 1995, are revoked. In accordance with 19 U.S.C. 1625(c)(1), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to 19 U.S.C. 1625(c)(1) does not constitute a change of practice or position in accordance with section 177.10 (c)(1), Customs Regulations [19 CFR 177.10(c)(1)].

MARVIN M. AMERNICK,
(for John Durant, Director
Tariff Classification Appeals Division.)

[ATTACHMENT C]

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE,
New York, NY, August 20, 1993.
CLA–2–94:S:N:N3:227 888716
Category: Classification
Tariff No. 9405.50.4000

MS. LORRAINE M. DUGAN
ASSOCIATED MERCHANDISING CORPORATION
1440 Broadway
New York, NY 10018

Re: The tariff classification of candle holders from Mexico.

DEAR MS. DUGAN:

In your letter dated July 22, 1993, you requested a tariff classification ruling. Samples are being returned as requested.

The samples submitted are two candle holders consisting of a wrought iron stand, measuring approximately 7.25 inches high, and two bell-shape glass holders, styles 133 SW I and 133 SW D. It is noted that either one of these holders can be inserted into the top portion of the stand.

The applicable subheading for these candle holders will be 9405.50.4000, Harmonized Tariff Schedule of the United States (HTS), which provides for other non-electrical lamps and lighting fittings. The duty rate will be 7.6 percent *ad valorem*.

Articles classifiable under subheading 9405.50.4000, HTS, which are products of Mexico, are entitled to duty free treatment under the Generalized System of Preferences (GSP) upon compliance with all applicable regulations.

This ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

JEAN F. MAGUIRE,
Area Director,
New York Seaport.

[ATTACHMENT D]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, February 22, 1996.

CLA–2–94:RR:NC:GI: 227 818540
Category: Classification
Tariff No. 9405.50.4000

MR. PETER J. FITCH
FITCH, KING AND CAFFENTZIS
116 John Street
New York, NY 10038

Re: The tariff classification of candleholders from Mexico.

DEAR MR. FITCH:

In your letter dated January 25, 1996, on behalf of The Pomeroy Collection, Inc., you requested a tariff classification ruling.

The merchandise at issue is candleholders that are composed of three-legged iron wrought pedestal-like bases which possess top openings designed to hold circular-shape glass inserts (candleholders). These articles consist of the following:

a) item number 943003 which has an iron base of 4½2 inches high;
b) item number 944000, noting sample submitted, which has an iron base of 5½ inches high;
c) item number 945007 which has an iron base of 8 inches high.

Despite the differences in the height of the bases, it is noted that each base will hold a glass insert (candleholder) which measures about 3½ inches high by 3½ inches across its top diameter.

It is stated that the subject merchandise, designed as candleholders, will be advertised and marketed also as candleholders, noting the submission of the substantiating literature in that regard.

The applicable subheading for the instant glass candleholders with iron bases, item numbers 943003, 944000 and 945007, will be 9405.50.4000, Harmonized Tariff Schedule of the United States (HTS), which provides for other non-electrical lamps and lighting fittings. The general rate of duty will be 7 percent *ad valorem*.

This ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling letter or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist George Kalkines at 212–466–5794.

ROGER J. SILVESTRI,
Director,
National Commodity Specialist Division.

[ATTACHMENT E]

DEPARTMENT OF THE TREASURY.
U.S. CUSTOMS SERVICE,
New York, NY, March 7, 1996.

CLA-2-94:RR:NC:GI: 227 A80401
Category: Classification
Tariff No. 9405.50.4000

MR. MAURITZ PLENBY
ASSOCIATED MERCHANDISING CORP.
1440 Broadway
New York, NY 10018

Re: The tariff classification of candleholders from Taiwan.

DEAR MR. PLENBY:

In your letter dated February 9, 1996, you requested a tariff classification ruling. Samples are being returned as requested.

The samples submitted consist of the following candleholders:

a) a chair-shape metal candleholder, style number 547536, which measures approximately 9½ inches high by 3¾ inches at its widest dimension. It is noted that situated at the midsection of its seat portion, there is a pointed piece of metal for affixing a candle;

b) a tripod-shape metal candleholder, style number 547533, which measures about 15 inches in height and possesses a dome-shape glass holder measuring nearly 5 inches high with a top diameter of 3¼ inches;

c) a tripod-shape metal candleholder, style number 545351, which measures about 3 inches in height and possesses a glass holder measuring nearly 2 inches high with a top diameter of 2¼ inches;

d) a tripod-shape metal candleholder, style number 547412, which measures approximately 5 inches in height and possesses a plate-shape glass holder measuring about 4½ inches in diameter.

The applicable subheading for the chair-shape candleholder, style number 547536, and the tripod-shape candleholders, style numbers 547533, 545351 and 547412, will be 9405.50.4000, Harmonized Tariff Schedule of the United States (HTS), which provides for other non-electrical lamps and lighting fittings. The rate of duty will be 7 percent *ad valorem*.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling letter or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist George Kalkines at 212-466-5794.

ROGER J. SILVESTRI,
Director,
National Commodity Specialist Division.

[ATTACHMENT F]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, June 28, 1996.

CLA–2–94:RR:NC:GI: 227 A84166
Category: Classification
Tariff No. 9405.50.4000

MS. ASTRA GALINS
CYRK, INC.
3 Pond Road
Gloucester, MA 01930

Re: The tariff classification of a candleholder from China.

DEAR MS. GALINS:

In your letter dated May 28, 1996, you requested a tariff classification ruling. Sample is being returned as requested.

The sample submitted is a tripod-shape metal candleholder which measures approximately 5 inches in height and possesses a dome-shape glass holder measuring nearly 3¼ inches high with a top diameter of 3¾ inches.

The applicable subheading for this tripod-shape metal candleholder will be 9405.50.4000, Harmonized Tariff Schedule of the United States (HTS), which provides for other non-electrical lamps and lighting fittings. The rate of duty will be 7 percent *ad valorem*.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling letter or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist George Kalkines at 212–466–5794.

ROGER J. SILVESTRI,
Director,
National Commodity Specialist Division.

[ATTACHMENT G]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, October 17, 1995.

CLA–2–94:R:N4:227 815064
Category: Classification
Tariff No. 9405.50.4000

MR. MAURITZ PLENB
YARNC
1440 Broadway
New York, NY 10018

Re: The tariff classification of glass candle holders from Mexico.

DEAR MR. PLENBY:

In your letter dated September 18, 1995, you requested a tariff classification ruling. The samples will be returned as you requested.

The two items in question are composite articles, each consisting of a metal iron pedestal holding a glass vessel. One sample, style octavio, has a black wrought iron stand, measuring 6.1 inches in height, and a glass bell shaped insert, measuring 2.75 inches in diameter and 4 inches in height. The other sample, style EK7, has a wrought iron stand having a brass look, measuring 7.2 inches in height, and a glass disk shaped insert, measuring

2.5 inches in diameter and 1.9 inches in height. Both articles are marketed and sold as candle holders.

The applicable subheading for the candle holders, styles octavio and EK7, will be 9405.50.4000, Harmonized Tariff Schedule of the United States (HTS), which provides for non-electrical lamps and lighting fittings, other than of brass. The duty rate will be 7.3 percent *ad valorem*.

This ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist George Kalkines at (212) 466–5794.

ROGER J. SILVESTRI,
Director,
National Commodity Specialist Division.

[ATTACHMENT H]

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:CR:GC 961222 PH
Category: Classification
Tariff No. 7013.99.50 and 9405.50.40

MR. JOHN M. MOLSBERRY
ROBERT E. LANDWEER & CO., INC.
CUSTOMHOUSE BROKERS
911 Western Avenue, Suite 208
Seattle, WA 98104

Re: HQ 957127 revoked; flower pot-shaped glassware; other decorative glassware; glass candle holder; principal use; Additional U.S. Rule of Interpretation 1(a); ENs 70.13; 94.05.

DEAR MR. MOLSBERRY:

In HQ 957127, issued to you on behalf of Design Imports India on May 16, 1995, we held that certain "flower pot" shaped frosted glass articles were classifiable in subheading 9405.50.40, Harmonized Tariff Schedule of the United States (HTSUS), as non-electrical lamps and lighting fittings. We have reconsidered this ruling and now believe that it is incorrect.

Facts:

HQ 957127 described the merchandise as "flower pot vase" candle holders, consisting of thin frosted glass, measuring approximately 3″ or 2″ high and 2″ in diameter, imported packed six to a carton, with colors unique to each carton.

The subheadings under consideration are as follows:

7013.99.35 Glassware of a kind used for table, kitchen, toilet, office, indoor decoration or similar purposes (other than that of heading 7010 or 7018): * * * Other glassware: * * * Other: * * * Other: * * * Votive-candle holders.

The 1998 general column one rate of duty for goods classifiable under this provision is 6.6% *ad valorem*.

7013.99.50 Glassware of a kind used for table, kitchen, toilet, office, indoor decoration or similar purposes (other than that of heading 7010 or 7018): * * * Other glassware: * * * Other: * * * Other: * * * Other: * * * Valued over $0.30 but not over $3 each.

The 1998 general column one rate of duty for goods classifiable under this provision is 30% *ad valorem*.

9405.50.40 Lamps and lighting fittings including searchlights and spotlights and parts thereof, not elsewhere specified or included * * *: * * * Non-electrical lamps and lighting fittings: * * * Other: * * * Other.

The 1998 general column one rate of duty for goods classifiable under this provision is 6.3% *ad valorem*.

Issue:

Are the "flower pot vase" articles classifiable as votive candle holders under subheading 7013.99.35, HTSUS, as other glassware of a kind used for indoor decoration or similar purposes under subheading 7013.99.50, HTSUS, or as candle holders under subheading 9405.50.40, HTSUS?

Law and Analysis:

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) in accordance with the General Rules of Interpretation (GRIs). GRI 1 states in part that for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6.

The Harmonized Commodity Description and Coding System Explanatory Notes (ENs) constitute the official interpretation of the Harmonized System. While not legally binding on the contracting parties, and therefore not dispositive, the ENs provide a commentary on the scope of each heading of the Harmonized System and are thus useful in ascertaining the classification of merchandise under the System. Customs believes the ENs should always be consulted. See T.D. 89–80, published in the Federal Register August 23, 1989 (54 FR 35127, 35128).

Subheadings 7013.99.35 and 7013.99.50, HTSUS, are use provisions, under which articles are classifiable according to the use of the class or kind of goods to which the articles belong. If an article is classifiable according to the use of the class or kind of goods to which it belongs, Additional U.S. Rule of Interpretation 1(a), HTSUS, provides that:

> In the absence of special language or context which otherwise requires—(a) a tariff classification controlled by use (other than actual use) is to be determined in accordance with the use in the United States at, or immediately prior to, the date of importation, of goods of that class or kind to which the imported goods belong, and the controlling use is the principal use.

In other words, the article's principal use in the United States at the time of importation determines whether it is classifiable within a particular class or kind (*principal use* is distinguished from *actual use*; a tariff classification controlled by the latter is satisfied only if such use is intended at the time of importation, the goods are so used and proof thereof is furnished within 3 years after the date the goods are entered (U.S. Additional Note 1(b); 19 CFR 10.131–10.139)).

The Courts have provided factors, which are indicative but not conclusive, to apply when determining whether merchandise falls within a particular class or kind. They include: general physical characteristics, expectation of the ultimate purchaser, channels of trade, environment of sale (accompanying accessories, manner of advertisement and display), use in the same manner as merchandise which defines the class, economic practicality of so using the import, and recognition in the trade of this use. See *Kraft, Inc, v. United States*, 16 CIT 483 (1992), *G. Heileman Brewing Co. v. United States*, 14 CIT 614 (1990), and *United States v. Carborundum Company*, 63 CCPA 98, C.A.D. 1172, 536 F. 2d 373 (1976), *cert. denied*, 429 U.S. 979 (1976).

In applying Additional U.S. Rule of Interpretation 1(a) and the above cases to articles of glass, it is Customs position that, as a general rule, the article's physical form will indicate its principal use and thus to what class or kind it belongs. However, should an exception arise so that an article's physical form does not indicate to what class or kind it belongs or its physical form indicates it belongs to more than one class or kind, Customs considers the other enumerated principal use criteria.

Insofar as applicability of subheading 7013.99.35, HTSUS, for glass votive-candle holders, to the merchandise is concerned, HQ 957127 is correct and the analysis of that issue in HQ 957127 is unchanged. That is, HQ 957127 held that classification under subheading 7013.99.35, HTSUS, was precluded. The basis for this holding was that no evidence was provided to indicate that the article is principally used for the purposes that we have held a votive-candle holder must be used (commemorative, devotional or religious purposes), the article is not a sanctuary lamp or a candle holder, and the article does not have any physical

characteristics consistent with a votive-candle holder. See, HQs 088123 dated February 25, 1991, 088742 dated April 22, 1991, 950245 dated December 10, 1991, and 954372 dated September 2, 1994.

HQ 957127 found that the physical characteristics of the subject article, as well as the manner in which it is used, prevents it from being described by subheading 7013.99.50, HTSUS. The first stated reason for so finding was that "[f]lower pots necessarily have drainage holes * * * [and] these articles do not." HQ 957127 also noted the small size and frosted nature of samples of the articles, as well as the apparent use of thin glass to make the samples which, according to the ruling, are consistent with a candle holder's purpose and indicate that use of a flower pot may not have been contemplated.

It is incorrect that "[f]lower pots necessarily have drainage holes" (see, *e.g.*, *Indoor Plants: Comprehensive Care and Culture*, Doris F. Hirsch (1977), pp. 178–179). Furthermore, the question of whether the merchandise are used as flower pots is not dispositive of the issue of whether the merchandise is described by subheading 7013.99.50, HTSUS. Included in that subheading is "[g]lassware of a kind used for * * * indoor decoration or similar purposes * * *" (heading 7013; see also, EN 70.13). Thus, insofar as subheading 7013.99.50, HTSUS, is concerned, the issue is not whether the merchandise is used as a flower pot, but whether or not the principal use of the merchandise is for indoor decoration or similar purposes.

As stated above, physical form indicates the principal use of glass articles. If an article's physical form does not indicate to what class or kind it belongs or its physical form indicates it belongs to more than one class or kind, Customs considers the other enumerated principal use criteria.

In this case, the physical form is not necessarily that of a candle holder (*e.g.*, there is no "spike" at the bottom of the piece of glassware to hold the candle, and the size is greater than that of a standard-sized candle holder (inside diameter of less than 1 inch, depth of approximately 1–1½ inches), enabling the glassware to be used for other, general decorative purposes). Rather, the physical form of the merchandise is that of a general purpose article, which could be used to hold potpourri, flowers, or miscellaneous items, as well as candles (see HQ 956048 dated July 7, 1994, for a similar ruling as to glass vessels with metal iron pedestals of various sizes and styling). Insofar as the other principal use criteria are concerned, the importer has provided no evidence about the *class or kind of merchandise* involved regarding the expectation of the ultimate purchaser, channels of trade, environment of sale, use in the same manner as merchandise which defines the class, economic practicality of so using the imported article, and recognition in the trade of this use (we note that for principal use, what controls is the use of the *class or kind* of articles involved; not the use of the *actual article* involved). This office has recently received evidence of use of similar glassware to hold potpourri (see, *e.g.*, HQs 960819, 961095, 961141).

HQ 957127 classified the merchandise under consideration under subheading 9405.50.40, HTSUS, as non-electrical lamps and lighting fittings, on the basis that "[t]hey are principally used in the United States as support for a candle." As stated above, we find that this is *not* the principal use of the merchandise. Rather, the principal use of the merchandise is as decorative glassware, on the basis of the physical form of the merchandise and evidence since received by this office relating to the other principal use criteria for the class or kind of merchandise involved. Compare to *Lenox Collections v. United States* CIT Slip Op. 96–30, February 2, 1996 (holding that elaborate porcelain containers called the "Spice Village" capable of holding spice were of the class of goods used principally for decorative purposes); *Heileman*, *supra* (holding that although ceramic steins could hold beer, they were chiefly used for ornamental purposes); and *United States v. Baltimore and Ohio R.R. Co.*, 47 CCPA 1, C.A.D. 719 (1959) (holding that although after-dinner coffee cups could hold hot beverages, they were chiefly used for ornamentation on shelves or racks).

In the absence of aspects of the physical form of the imported articles which indicate that the principal use of the merchandise is to hold a candle, and in the absence of any evidence from the importer with respect to the other principal use criteria for the class or kind of merchandise, we conclude that the principal use of the class or kind of the merchandise under consideration is as other glassware used for indoor decoration or similar purposes, valued over $0.30 but not more than $3 each, in subheading 7013.99.50, HTSUS.

Holding:

The "flower pot vase" articles are classifiable as other glassware of a kind used for indoor decoration or similar purposes, valued over $0.30 but nor more than $3 each, under subheading 7013.99.50, HTSUS.

HQ 957127 is revoked. In accordance with 19 U.S.C. 625(c)(1), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to 19 U.S.C. 625(c)(1) does not constitute a change of practice or position in accordance with section 177.10 (c)(1), Customs Regulations [19 CFR 177.10(c)(1)].

JOHN DURANT,
Director,
Commercial Rulings Division.

[ATTACHMENT I]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:CR:GC 961221 PH
Category: Classification
Tariff No. 7013.99 And 9405.50.40

MR. DANIEL T. PETROSINI
ALPHA INTERNATIONAL
40 Parker Road, Suite 201
Elizabeth, NJ 07207

Re: HQ 957794 revoked; "trilogy" and "tulip" iron pedestals with bell-shaped glassware; other decorative glassware; glass candle holder; principal use; composite good; essential character; GRI 3(b); Additional U.S. Rule of Interpretation 1(a); ENs Rule 3(b)(IX); 70.13; 94.05.

DEAR MR. PETROSINI:

In HQ 957794, issued to you on behalf of Park B. Smith, Ltd., on October 2, 1995, we held that certain "trilogy" and "tulip" glass and iron articles were classifiable in subheading 9405.50.40, Harmonized Tariff Schedule of the United States (HTSUS) as non-electrical lamps and lighting fittings. We have reconsidered this ruling and now believe that it is incorrect.

Facts:

HQ 957794 described the merchandise as glass vessels with iron pedestals. The FACTS as described in HQ 957794 are unchanged. That is, in pertinent part, the iron portion of the merchandise is crafted into various shaped frames to act as a pedestal for the glass vessel. Submitted marketing literature describes the merchandise as "Environments decorative lighting" and retail advertising of the articles describe them as "decorative candle holders", "votive candle holders", "iron lighting sets" and "candle holders". The "trilogy" style is imported in 3 sizes; small (5″ high), medium (6″ high) and large (7″ high). The glass portion of the 5″ high "trilogy" sample presented has an interior depth of approximately 3″ and an interior diameter of approximately 1½″.

The "tulip" style is a combination of a frosted colored glass vessel in the shape of a blooming tulip and a green painted iron pedestal. The pedestal has a holder fashioned for the vessel and is connected to a base by an iron rod. The iron rod is shaped to appear to be a flower stem and has protruding leaf shaped iron pieces. The "tulip" style comes in three sizes; small (7″ high), medium (12″ high) and large (16″ high). The glass portion of the "tulip" sample presented has an interior depth of approximately 2½″ and an interior diameter of approximately 2″.

The subheadings under consideration are as follows:

7013.99	Glassware of a kind used for table, kitchen, toilet, office, indoor decoration or similar purposes (other than that of heading 7010 or 7018): * * * Other glassware: * * * Other: * * * Other: * * * Other.

The 1998 general column one rate of duty for goods classifiable under this provision is dependent on the value of the goods (*i.e.*, in subheading 7013.99.40 (valued not over $0.30 each), 38% *ad valorem*, in subheading 7013.99.50 (valued over $0.30 but not over

$3 each) 30% *ad valorem*, or under subheading 7013.99.60 (valued over $3 each) 15% *ad valorem* if cut or engraved and valued over $3 but not over $5 each, 7.2% *ad valorem* if cut or engraved and valued over $5 each, 13.5% *ad valorem* if other than cut or engraved and valued over $3 but not over $5 each, or 7.2% *ad valorem* if other than cut or engraved and valued over $5 each).

9405.50.40 Lamps and lighting fittings including searchlights and spotlights and parts thereof, not elsewhere specified or included * * *: * * * Non-electrical lamps and lighting fittings: * * * Other: * * * Other.

The 1998 general column one rate of duty for goods classifiable under this provision is 6.3% *ad valorem*.

Issue:

Are styles "trilogy" and "tulip" glass and iron articles classifiable as other glassware of a kind used for indoor decoration or similar purposes under subheading 7013.99, HTSUS, or as candle holders under subheading 9405.50.40, HTSUS?

Law and Analysis:

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) in accordance with the General Rules of Interpretation (GRIs). GRI 1 states in part that for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6. Pursuant to GRI 3(b), when goods are *prima facie* classifiable under two or more headings, classification shall be effected as follows:

(b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

The Harmonized Commodity Description and Coding System Explanatory Notes (ENs) constitute the official interpretation of the Harmonized System. While not legally binding on the contracting parties, and therefore not dispositive, the ENs provide a commentary on the scope of each heading of the Harmonized System and are thus useful in ascertaining the classification of merchandise under the System. Customs believes the ENs should always be consulted. See T.D. 89–80, published in the Federal Register August 23, 1989 (54 FR 35127, 35128).

EN Rule 3(b)(IX) states, in part, that:

For the purposes of this Rule, composite goods made up of different components shall be taken to mean not only those in which the components are attached to each other to form a practically inseparable whole but also those with separable components, **provided** these components are adapted one to the other and are mutually complementary and that together they form a whole which would not normally be offered for sale in separate parts.

Examples of the latter category of goods are:

(1) Ashtrays consisting of a stand incorporating a removable ash bowl. * * * [Emphasis in original]

In this case, we are of the opinion that the metal pedestal with glassware is a composite good. The components of the article, the metal pedestal and glassware, are adapted one to the other, mutually complementary, and together form a whole which would not normally be offered for sale in separate parts, just as is true of the example given in the EN, an ashtray consisting of a stand with a removable ash bowl. For purposes of this conclusion, we assume that the form of the glassware is such that it cannot stand on its own (*i.e.*, because of the rounded base of the glassware, the metal pedestal is necessary to keep it in an upright position). Otherwise, the glassware may not necessarily be complementary to the metal pedestal and each could be offered for sale separately. If so, rather than being a composite good, the metal pedestal with glassware would be a set (see EN Rule 3(b)(X)). Whether a composite good or set, classification is determined on the basis of the component which imparts the essential character.

In general, essential character has been construed to mean the attribute which strongly marks or serves to distinguish what an article is; that which is indispensable to the structure, core or condition of the article. EN Rule 3(b)(VIII) provides factors which help deter-

mine the essential character of goods. The factors listed in EN rule 3(b)(VIII) include the nature of the material or component, bulk, quantity, weight or value, or the role of a constituent material in relation to the use of the goods.

Based on the information submitted, we are of the opinion that the essential character of the metal pedestal with glassware is the glassware. The glassware is the component which distinguishes the article. It is the component which fulfills the function of the article; it holds the object to be displayed (*e.g.*, flowers, plants, potpourri, candles, etc.). The metal pedestal merely supports the glassware. Therefore, the glassware imparts the essential character to the merchandise. See HQ 956048 dated July 7, 1994.

Subheading 7013.99, HTSUS, is a use provision, under which articles are classifiable according to the use of the class or kind of goods to which the articles belong. If an article is classifiable according to the use of the class or kind of goods to which it belongs, Additional U.S. Rule of Interpretation 1(a), HTSUS, provides that:

> In the absence of special language or context which otherwise requires—(a) a tariff classification controlled by use (other than actual use) is to be determined in accordance with the use in the United States at, or immediately prior to, the date of importation, of goods of that class or kind to which the imported goods belong, and the controlling use is the principal use.

In other words, the article's principal use in the United States at the time of importation determines whether it is classifiable within a particular class or kind (*principal use* is distinguished from *actual use*; a tariff classification controlled by the latter is satisfied only if such use is intended at the time of importation, the goods are so used and proof thereof is furnished within 3 years after the date the goods are entered (U.S. Additional Note 1(b); 19 CFR 10.131–10.139)).

The Courts have provided factors, which are indicative but not conclusive, to apply when determining whether merchandise falls within a particular class or kind. They include: general physical characteristics, expectation of the ultimate purchaser, channels of trade, environment of sale (accompanying accessories, manner of advertisement and display), use in the same manner as merchandise which defines the class, economic practicality of so using the import, and recognition in the trade of this use. See *Kraft, Inc, v. United States*, 16 CIT 483 (1992), *G. Heileman Brewing Co. v. United States*, 14 CIT 614 (1990), and *United States v. Carborundum Company*, 63 CCPA 98, C.A.D. 1172, 536 F. 2d 373 (1976), *cert. denied*, 429 U.S. 979 (1976).

In applying Additional U.S. Rule of Interpretation 1(a) and the above cases to articles of glass, it is Customs position that, as a general rule, the article's physical form will indicate its principal use and thus to what class or kind it belongs. However, should an exception arise so that an article's physical form does not indicate to what class or kind it belongs or its physical form indicates it belongs to more than one class or kind, Customs considers the other enumerated principal use criteria.

HQ 957794 found that the physical characteristics of the articles showed that the articles were not principally dedicated to use of the class or kind of merchandise contemplated by subheading 7013.99.50, HTSUS. In this regard, HQ 957794 cited the relatively small size of each glass vessel (in the case of the "trilogy", the glass vessel for the 5″ sample has an interior depth of approximately 3″ and an interior diameter of approximately 1½″; in the case of the "tulip", the glass vessel has an interior depth of approximately 2½″ and an interior diameter of approximately 2″) and the frosted nature of the glass vessels in the case of the "tulip". HQ 957794 also referred to submitted catalogs and advertisements indicating that the articles are dedicated to a sole use as candle holders.

Subheading 7013.99, HTSUS, includes "[g]lassware of a kind used for * * * indoor decoration or similar purposes * * *" (heading 7013; see also, EN 70.13). Thus, insofar as subheading 7013.99, HTSUS, is concerned, the issue is whether or not the principal use of the merchandise is for indoor decoration or similar purposes. As stated above, for glass articles physical form indicates its principal use. If an article's physical form does not indicate to what class or kind it belongs, or its physical form indicates it belongs to more than one class or kind, Customs considers the other enumerated principal use criteria.

In this case, the physical form is not necessarily that of a candle holder (*e.g.*, there is no "spike" at the bottom of the piece of glassware to hold the candle, and the size is greater than that of a standard-sized candle holder (inside diameter of less than 1 inch, depth of approximately 1–1½ inches), enabling the glassware to be used for other, general decorative purposes). Rather, the physical form of the merchandise is that of a general purpose article, which could be used to hold potpourri, flowers, or miscellaneous items, as well as

candles (see HQ 956048 dated July 7, 1994, for a similar ruling as to glass vessels with metal iron pedestals of various sizes and styling). Insofar as the other principal use criteria are concerned, although the importer has provided advertising information as to how *this* merchandise is marketed, the importer has provided no evidence about the *class or kind of merchandise* involved regarding the expectation of the ultimate purchaser, channels of trade, environment of sale, use in the same manner as merchandise which defines the class, economic practicality of so using the imported article, and recognition in the trade of this use (we note that for principal use, what controls is the use of the *class or kind* of articles involved; not the use of the *actual article* involved). This office has recently received evidence of use of similar glassware to hold potpourri (see, *e.g.*, HQs 960819, 961095, 961141).

HQ 957794 classified the merchandise under consideration under subheading 9405.50.40, HTSUS, as non-electrical lamps and lighting fittings, on the basis that "[t]hey are principally used in the United States as support for a candle." As stated above, we find that this is *not* the principal use of the merchandise. Rather, the principal use of the merchandise is as decorative glassware, on the basis of the physical form of the merchandise and evidence since received by this office relating to the other principal use criteria for the class or kind of merchandise involved. Compare to *Lenox Collections v. United States* CIT Slip Op. 96–30, February 2, 1996 (holding that elaborate porcelain containers called the "Spice Village" capable of holding spice were of the class of goods used principally for decorative purposes); *Heileman, supra* (holding that although ceramic steins could hold beer, they were chiefly used for ornamental purposes); and *United States v. Baltimore and Ohio R.R. Co.*, 47 CCPA 1, C.A.D. 719 (1959) (holding that although after-dinner coffee cups could hold hot beverages, they were chiefly used for ornamentation on shelves or racks).

In the absence of aspects of the physical form of the imported article which indicate that the principal use of the merchandise is to hold a candle, and in the absence of any evidence from the importer with respect to the other principal use criteria for the class or kind of merchandise, we conclude that the principal use of the class or kind of the merchandise under consideration is as other glassware used for indoor decoration or similar purposes, under subheading 7013.99, HTSUS.

In the case of unit value provisions, such as subheadings 7013.99.40, 7013.99.50, and 7013.99.60, the value of the entire composite good is used to arrive at the unit value, for purposes of classification. See, *e.g.*, HQ 087878 dated May 20, 1991, in which the total value of a composite good was $4.48 each and the value of the component which gave the good its essential character was $0.39; classification was held to be under a subheading with a unit value of over $3 but not over $5 each. (In the case of sets, the value of the component which gives the set its essential character, and not the value of the entire set, is used to arrive at the unit value. See, *e.g.*, HQ 954414 dated March 25, 1994.)

Holding:

The "trilogy" and "tulip" styles glass and iron articles are classifiable as other glassware of a kind used for indoor decoration or similar purposes, under subheading 7013.99.40, 7013.99.50, or 7013.99.60, HTSUS, depending on value (value of the entire good, assuming that it is a composite good).

HQ 957794 is revoked. In accordance with 19 U.S.C. 625(c)(1), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to 19 U.S.C. 625(c)(1) does not constitute a change of practice or position in accordance with section 177.10 (c)(1), Customs Regulations [19 CFR 177.10(c)(1)].

JOHN DURANT,
Director,
Commercial Rulings Division.

[ATTACHMENT J]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:CR:GC 961220 PH
Category: Classification
Tariff No. 7013.99 and 9405.50.40

MS. LORRAINE M. DUGAN
ASSOCIATED MERCHANDISING CORPORATION
1440 Broadway
New York, NY 10018

Re: NY 888716 revoked; metal iron pedestal with bell or disk-shaped glass vessel or insert; other decorative glassware; glass candle holder; principal use; composite good; essential character; GRI 3(b); Additional U.S. Rule of Interpretation 1(a); ENs Rule 3(b)(IX); 70.13; 94.05.

DEAR MS. DUGAN:

On August 20, 1993, New York Ruling Letter (NY) 888716 was issued to you concerning items "133 SW I" and "133 SW D". You were advised that the merchandise was classifiable in subheading 9405.50.40, Harmonized Tariff Schedule of the United States (HTSUS), as non-electrical lamps and lighting fittings. We have reconsidered this ruling and now believe that it is incorrect.

Facts:

NY 888716 described the items as consisting of a wrought iron stand approximately 7.25" high with two bell-shape glass vessels or inserts, either of which can be inserted into the top portion of the iron stand. Dimensions of the bell-shape glass vessels or inserts are not provided.

The subheadings under consideration are as follows:

> 7013.99 Glassware of a kind used for table, kitchen, toilet, office, indoor decoration or similar purposes (other than that of heading 7010 or 7018): * * * Other glassware: * * * Other: * * * Other: * * * Other.
>
> The 1998 general column one rate of duty for goods classifiable under this provision is dependent on the value of the goods (*i.e.*, in subheading 7013.99.40 (valued not over $0.30 each), 38% *ad valorem*, in subheading 7013.99.50 (valued over $0.30 but not over $3 each) 30% *ad valorem*, or under subheading 7013.99.60 (valued over $3 each) 15% *ad valorem* if cut or engraved and valued over $3 but not over $5 each, 7.2% *ad valorem* if cut or engraved and valued over $5 each, 13.5% *ad valorem* if other than cut or engraved and valued over $3 but not over $5 each, or 7.2% *ad valorem* if other than cut or engraved and valued over $5 each).
>
> 9405.50.40 Lamps and lighting fittings including searchlights and spotlights and parts thereof, not elsewhere specified or included * * *: * * * Non-electrical lamps and lighting fittings: * * * Other: * * * Other.
>
> The 1998 general column one rate of duty for goods classifiable under this provision is 6.3% *ad valorem*.

Issue:

Are the iron stands with bell-shaped glass vessels or inserts classifiable as other glassware of a kind used for indoor decoration or similar purposes under subheading 7013.99, HTSUS, or as candle holders under subheading 9405.50.40, HTSUS?

Law And Analysis:

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) in accordance with the General Rules of Interpretation (GRIs). GRI 1 states in part that for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6. Pursuant to GRI 3(b), when goods are *prima facie* classifiable under two or more headings, classification shall be effected as follows:

> (b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by ref-

> erence to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

The Harmonized Commodity Description and Coding System Explanatory Notes (ENs) constitute the official interpretation of the Harmonized System. While not legally binding on the contracting parties, and therefore not dispositive, the ENs provide a commentary on the scope of each heading of the Harmonized System and are thus useful in ascertaining the classification of merchandise under the System. Customs believes the ENs should always be consulted. See T.D. 89–80, published in the Federal Register August 23, 1989 (54 FR 35127, 35128).

EN Rule 3(b)(IX) states, in part, that:

> For the purposes of this Rule, composite goods made up of different components shall be taken to mean not only those in which the components are attached to each other to form a practically inseparable whole but also those with separable components, **provided** these components are adapted one to the other and are mutually complementary and that together they form a whole which would not normally be offered for sale in separate parts.
>
> Examples of the latter category of goods are:
>
> (1) Ashtrays consisting of a stand incorporating a removable ash bowl. * * * [Emphasis in original]

In this case, we are of the opinion that the metal stands with glass vessels or inserts are composite goods. In the absence of more information regarding the items, we conclude that the components of the articles, the metal stands and glassware, are adapted one to the other, mutually complementary, and together form a whole which would not normally be offered for sale in separate parts, just as is true of the example given in the EN, an ashtray consisting of a stand with a removable ash bowl. For purposes of this conclusion, we assume that the form of the glass vessels or inserts is such that they cannot stand on their own (*i.e.*, because of their rounded bases, the metal stands are necessary to keep them in an upright position). Otherwise the glass vessels or inserts may not necessarily be complementary to the metal stands and each could be offered for sale separately. If so, rather than being composite goods, the metal stands with glass vessels or inserts would be sets (see EN Rule 3(b)(X)). Whether composite goods or sets, classification is determined on the basis of the component which imparts the essential character.

In general, essential character has been construed to mean the attribute which strongly marks or serves to distinguish what an article is; that which is indispensable to the structure, core or condition of the article. EN Rule 3(b)(VIII) provides factors which help determine the essential character of goods. The factors listed in EN rule 3(b)(VIII) include the nature of the material or component, bulk, quantity, weight or value, or the role of a constituent material in relation to the use of the goods.

Based on the information submitted, we are of the opinion that the essential character of the metal stands with glass vessels or inserts is the glassware. The glassware is the component which distinguishes the articles. It is the component which fulfills the function of the articles; it holds the object to be displayed (*e.g.*, flowers, plants, potpourri, candles, etc.). The metal stands merely support the glassware. Therefore, the glassware imparts the essential character to the merchandise. See HQ 956048 dated July 7, 1994.

Subheading 7013.99.50, HTSUS, is a use provision, under which articles are classifiable according to the use of the class or kind of goods to which the articles belong. If an article is classifiable according to the use of the class or kind of goods to which it belongs, Additional U.S. Rule of Interpretation 1(a), HTSUS, provides that:

> In the absence of special language or context which otherwise requires—(a) a tariff classification controlled by use (other than actual use) is to be determined in accordance with the use in the United States at, or immediately prior to, the date of importation, of goods of that class or kind to which the imported goods belong, and the controlling use is the principal use.

In other words, the article's principal use in the United States at the time of importation determines whether it is classifiable within a particular class or kind (*principal use* is distinguished from *actual use*; a tariff classification controlled by the latter is satisfied only if such use is intended at the time of importation, the goods are so used and proof thereof is furnished within 3 years after the date the goods are entered (U.S. Additional Note 1(b); 19 CFR 10.131–10.139)).

The Courts have provided factors, which are indicative but not conclusive, to apply when determining whether merchandise falls within a particular class or kind. They include:

general physical characteristics, expectation of the ultimate purchaser, channels of trade, environment of sale (accompanying accessories, manner of advertisement and display), use in the same manner as merchandise which defines the class, economic practicality of so using the import, and recognition in the trade of this use. See *Kraft, Inc, v. United States*, 16 CIT 483 (1992), *G. Heileman Brewing Co. v. United States*, 14 CIT 614 (1990), and *United States v. Carborundum Company*, 63 CCPA 98, C.A.D. 1172, 536 F. 2d 373 (1976), *cert. denied*, 429 U.S. 979 (1976).

In applying Additional U.S. Rule of Interpretation 1(a) and the above cases to articles of glass, it is Customs position that, as a general rule, the article's physical form will indicate its principal use and thus to what class or kind it belongs. However, should an exception arise so that an article's physical form does not indicate to what class or kind it belongs or its physical form indicates it belongs to more than one class or kind, Customs considers the other enumerated principal use criteria.

Subheading 7013.99.50, HTSUS, includes "[g]lassware of a kind used for * * * indoor decoration or similar purposes * * *" (heading 7013; see also, EN 70.13). Thus, insofar as subheading 7013.99.50, HTSUS, is concerned, the issue is whether or not the principal use of the merchandise is for indoor decoration or similar purposes. As stated above, for glass articles physical form indicates its principal use. If an article's physical form does not indicate to what class or kind it belongs or its physical form indicates it belongs to more than one class or kind, Customs considers the other enumerated principal use criteria.

In this case, there is no evidence that the physical form is necessarily that of a candle holder (*e.g.*, there is no "spike" at the bottom of the glass vessel or insert to hold the candle, and the size of the glassware is not stated so that it may or may not be greater than that of a standard-sized candle holder (inside diameter of less than 1 inch, depth of approximately 1–1½" inches), enabling the glassware to be used for other, general decorative purposes). Rather, based on our review of similar articles and in the absence of a complete description of the glassware, we find that the physical form of the merchandise is that of a general purpose article, which could be used to hold potpourri, flowers, or miscellaneous items, as well as candles (see HQ 956048 dated July 7, 1994, for a similar ruling as to glass vessels with metal iron pedestals of various sizes and styling). Insofar as the other principal use criteria are concerned, the importer has provided no evidence about the *class or kind of merchandise* involved regarding the expectation of the ultimate purchaser, channels of trade, environment of sale, use in the same manner as merchandise which defines the class, economic practicality of so using the import, and recognition in the trade of this use (we note that for principal use what controls is the use of the *class or kind* of articles involved; not the use of the *actual article* involved). This office has recently received evidence of use of similarly described glassware to hold potpourri (see, *e.g.*, HQs 960819, 961095, 961141).

NY 888716 classified the merchandise under consideration under subheading 9405.50.40, HTSUS, as non-electrical lamps and lighting fittings. As stated above, we find that the principal use of the merchandise is as decorative glassware, on the basis of the physical form of like-described merchandise and on evidence since received by this office relating to the other principal use criteria for the class or kind of like-described merchandise. Compare to *Lenox Collections v. United States* CIT Slip Op. 96–30, February 2, 1996 (holding that elaborate porcelain containers called the "Spice Village" capable of holding spice were of the class of goods used principally for decorative purposes); *Heileman*, *supra* (holding that although ceramic steins could hold beer, they were chiefly used for ornamental purposes); and *United States v. Baltimore and Ohio R.R. Co.*, 47 CCPA 1, C.A.D. 719 (1959) (holding that although after-dinner coffee cups could hold hot beverages, they were chiefly used for ornamentation on shelves or racks).

In the absence of evidence of aspects of the physical form of the imported article which indicate that the principal use of the merchandise is to hold a candle, and in the absence of any evidence from the importer with respect to the other principal use criteria for the class or kind of merchandise, we conclude that the principal use of the class or kind of the merchandise under consideration is as other glassware used for indoor decoration or similar purposes, under subheading 7013.99, HTSUS.

In the case of unit value provisions, such as subheadings 7013.99.40, 7013.99.50, and 7013.99.60, the value of the entire composite good is used to arrive at the unit value, for purposes of classification. See, *e.g.*, HQ 087878 dated May 20, 1991, in which the total value of a composite good was $4.48 each and the value of the component which gave the good its essential character was $0.39; classification was held to be under a subheading with a unit value of over $3 but not over $5 each. (In the case of sets, the value of the component which

gives the set its essential character, and not the value of the entire set, is used to arrive at the unit value. See, *e.g.*, HQ 954414 dated March 25, 1994.)

Holding:

The iron stands with bell-shaped glass vessels or inserts are classifiable as other glassware of a kind used for indoor decoration or similar purposes, under subheading 7013.99.40, 7013.99.50, or 7013.99.60, HTSUS, depending on value (value of the entire good, assuming that it is a composite good).

NY 888716 is revoked. In accordance with 19 U.S.C. 625(c)(1), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to 19 U.S.C. 625(c)(1) does not constitute a change of practice or position in accordance with section 177.10 (c)(1), Customs Regulations [19 CFR 177.10(c)(1)].

JOHN DURANT,
Director,
Commercial Rulings Division.

[ATTACHMENT K]

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:CR:GC 961223 PH
Category: Classification
Tariff No. 7013.99 and 9405.50.40

MR. PETER J. FITCH
FITCH, KING AND CAFFENTZIS
116 John Street
New York, NY 10038

Re: NY 818540 revoked; three-legged iron pedestals with circular or bell-shaped glassware; other decorative glassware; glass candle holder; principal use; composite good; essential character; GRI 3(b); Additional U.S. Rule of Interpretation 1(a); ENs Rule 3(b)(IX); 70.13; 94.05.

DEAR MR. FITCH:

On February 23, 1996, New York Ruling Letter (NY) 818540 was issued to you on behalf of The Pomeroy Collection, Inc., concerning items 943003, 944000, and 945007. You were advised that the merchandise was classifiable in subheading 9405.50.40, Harmonized Tariff Schedule of the United States (HTSUS), as non-electrical lamps and lighting fittings. We have reconsidered this ruling and now believe that it is incorrect.

Facts:

NY 818540 described the merchandise as three-legged iron wrought pedestal-like bases which possess top openings designed to hold circular-shape glass inserts. Item 943003 has an iron base of 4½" high, items 944000 has an iron base of 5" inches high, and item 945007 has an iron base of 8 inches high. Each item holds a glass insert which measures about 3½ inches high by 3½ inches across its top diameter. According to NY 818540, the subject merchandise will be advertised and marketed also as candle holders, and substantiating literature is stated to have been submitted.

The subheadings under consideration are as follows:

7013.99	Glassware of a kind used for table, kitchen, toilet, office, indoor decoration or similar purposes (other than that of heading 7010 or 7018): * * * Other glassware: * * * Other: * * * Other: * * * Other.

The 1998 general column one rate of duty for goods classifiable under this provision is dependent on the value of the goods (*i.e.*, in subheading 7013.99.40 (valued not over $0.30 each), 38% *ad valorem*, in subheading 7013.99.50 (valued over $0.30 but not over $3 each) 30% *ad valorem*, or under subheading 7013.99.60 (valued over $3 each) 15%

ad valorem if cut or engraved and valued over $3 but not over $5 each, 7.2% *ad valorem* if cut or engraved and valued over $5 each, 13.5% *ad valorem* if other than cut or engraved and valued over $3 but not over $5 each, or 7.2% *ad valorem* if other than cut or engraved and valued over $5 each).

9405.50.40 Lamps and lighting fittings including searchlights and spotlights and parts thereof, not elsewhere specified or included * * *: * * * Non-electrical lamps and lighting fittings: * * * Other: * * * Other.

The 1998 general column one rate of duty for goods classifiable under this provision is 6.3% *ad valorem*.

Issue:

Are the three-legged iron pedestals with circular or bell-shaped glass inserts classifiable as other glassware of a kind used for indoor decoration or similar purposes under subheading 7013.99, HTSUS, or as candle holders under subheading 9405.50.40, HTSUS?

Law and Analysis:

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) in accordance with the General Rules of Interpretation (GRIs). GRI 1 states in part that for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6. Pursuant to GRI 3(b), when goods are *prima facie* classifiable under two or more headings, classification shall be effected as follows:

> (b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

The Harmonized Commodity Description and Coding System Explanatory Notes (ENs) constitute the official interpretation of the Harmonized System. While not legally binding on the contracting parties, and therefore not dispositive, the ENs provide a commentary on the scope of each heading of the Harmonized System and are thus useful in ascertaining the classification of merchandise under the System. Customs believes the ENs should always be consulted. See T.D. 89–80, published in the Federal Register August 23, 1989 (54 FR 35127, 35128).

EN Rule 3(b)(IX) states, in part, that:

> For the purposes of this Rule, composite goods made up of different components shall be taken to mean not only those in which the components are attached to each other to form a practically inseparable whole but also those with separable components, **provided** these components are adapted one to the other and are mutually complementary and that together they form a whole which would not normally be offered for sale in separate parts.

Examples of the latter category of goods are:

> (1) Ashtrays consisting of a stand incorporating a removable ash bowl. * * * [Emphasis in original]

In this case, we are of the opinion that the metal pedestal with glassware is a composite good. The components of the article, the metal pedestal and glassware, are adapted one to the other, mutually complementary, and together form a whole which would not normally be offered for sale in separate parts, just as is true of the example given in the EN, an ashtray consisting of a stand with a removable ash bowl. For purposes of this conclusion, we assume that the form of the glassware is such that it cannot stand on its own (*i.e.*, because of the rounded base of the glassware, the metal pedestal is necessary to keep it in an upright position). Otherwise, the glassware may not necessarily be complementary to the metal pedestal and each could be offered for sale separately. If so, rather than being a composite good, the metal pedestal with glassware would be a set (see EN Rule 3(b)(X)). Whether a composite good or set, classification is determined on the basis of the component which imparts the essential character.

In general, essential character has been construed to mean the attribute which strongly marks or serves to distinguish what an article is; that which is indispensable to the structure, core or condition of the article. EN Rule 3(b)(VIII) provides factors which help determine the essential character of goods. The factors listed in EN rule 3(b)(VIII) include the

nature of the material or component, bulk, quantity, weight or value, or the role of a constituent material in relation to the use of the goods.

Based on the information submitted, we are of the opinion that the essential character of the metal pedestal with glassware is the glassware. The glassware is the component which distinguishes the article. It is the component which fulfills the function of the article; it holds the object to be displayed (*e.g.*, flowers, plants, potpourri, candles, etc.). The metal pedestal merely supports the glassware. Therefore, the glassware imparts the essential character to the merchandise. See HQ 956048 dated July 7, 1994.

Subheading 7013.99, HTSUS, is a use provision, under which articles are classifiable according to the use of the class or kind of goods to which the articles belong. If an article is classifiable according to the use of the class or kind of goods to which it belongs, Additional U.S. Rule of Interpretation 1(a), HTSUS, provides that:

> In the absence of special language or context which otherwise requires—(a) a tariff classification controlled by use (other than actual use) is to be determined in accordance with the use in the United States at, or immediately prior to, the date of importation, of goods of that class or kind to which the imported goods belong, and the controlling use is the principal use.

In other words, the article's principal use in the United States at the time of importation determines whether it is classifiable within a particular class or kind (*principal use* is distinguished from *actual use*; a tariff classification controlled by the latter is satisfied only if such use is intended at the time of importation, the goods are so used and proof thereof is furnished within 3 years after the date the goods are entered (U.S. Additional Note 1(b); 19 CFR 10.131–10.139)).

The Courts have provided factors, which are indicative but not conclusive, to apply when determining whether merchandise falls within a particular class or kind. They include: general physical characteristics, expectation of the ultimate purchaser, channels of trade, environment of sale (accompanying accessories, manner of advertisement and display), use in the same manner as merchandise which defines the class, economic practicality of so using the import, and recognition in the trade of this use. See *Kraft, Inc., v. United States*, 16 CIT 483 (1992), *G. Heileman Brewing Co. v. United States*, 14 CIT 614 (1990), and *United States v. Carborundum Company*, 63 CCPA 98, C.A.D. 1172, 536 F. 2d 373 (1976), *cert. denied*, 429 U.S. 979 (1976).

In applying Additional U.S. Rule of Interpretation 1(a) and the above cases to articles of glass, it is Customs position that, as a general rule, the article's physical form will indicate its principal use and thus to what class or kind it belongs. However, should an exception arise so that an article's physical form does not indicate to what class or kind it belongs or its physical form indicates it belongs to more than one class or kind, Customs considers the other enumerated principal use criteria.

Subheading 7013.99, HTSUS, includes "[g]lassware of a kind used for * * * indoor decoration or similar purposes * * *" (heading 7013; see also, EN 70.13). Thus, insofar as subheading 7013.99, HTSUS, is concerned, the issue is whether or not the principal use of the merchandise is for indoor decoration or similar purposes. As stated above, for glass articles physical form indicates its principal use. If an article's physical form does not indicate to what class or kind it belongs or its physical form indicates it belongs to more than one class or kind, Customs considers the other enumerated principal use criteria.

In this case, the physical form is not necessarily that of a candle holder (*e.g.*, there is no "spike" at the bottom of the glass insert to hold the candle, and the size is greater than that of a standard-sized candle holder (inside diameter of less than 1 inch, depth of approximately 1–1½ inches), enabling the glassware to be used for other, general decorative purposes). Rather, the physical form of the merchandise is that of a general purpose article, which could be used to hold potpourri, flowers, or miscellaneous items, as well as candles (see HQ 956048 dated July 7, 1994, for a similar ruling as to glass vessels with metal iron pedestals of various sizes and styling). Insofar as the other criteria are concerned, although the importer may have provided advertising information as to how *this* merchandise is marketed, the importer has provided no evidence about the *class or kind of merchandise* involved regarding the expectation of the ultimate purchaser, channels of trade, environment of sale, use in the same manner as merchandise which defines the class, economic practicality of so using the import, and recognition in the trade of this use (we note that for principal use what controls is the use of the *class or kind* of articles involved; not the use of the *actual article* involved). This office has recently received evidence of use of similar glassware to hold potpourri (see, *e.g.*, HQs 960819, 961095, 961141).

NY 818540 classified the merchandise under consideration under subheading 9405.50.40, HTSUS, as non-electrical lamps and lighting fittings. As stated above, we find that the principal use of the merchandise is as decorative glassware, on the basis of the physical form of the merchandise and evidence since received by this office relating to the other principal use criteria for the class or kind of merchandise involved. Compare to *Lenox Collections v. United States* CIT Slip Op. 96–30, February 2, 1996 (holding that elaborate porcelain containers called the "Spice Village" capable of holding spice were of the class of goods used principally for decorative purposes); *Heileman, supra* (holding that although ceramic steins could hold beer, they were chiefly used for ornamental purposes); and *United States v. Baltimore and Ohio R.R. Co.*, 47 CCPA 1, C.A.D. 719 (1959) (holding that although after-dinner coffee cups could hold hot beverages, they were chiefly used for ornamentation on shelves or racks).

In the absence of evidence of aspects of the physical form of the imported article which indicate that the principal use of the merchandise is to hold a candle, and in the absence of any evidence from the importer with respect to the other principal use criteria for the class or kind of merchandise, we conclude that the principal use of the class or kind of the merchandise under consideration is as other glassware used for indoor decoration or similar purposes, under subheading 7013.99, HTSUS.

In the case of unit value provisions, such as subheadings 7013.99.40, 7013.99.50, and 7013.99.60, the value of the entire composite good is used to arrive at the unit value, for purposes of classification. See, *e.g.*, HQ 087878 dated May 20, 1991, in which the total value of a composite good was $4.48 each and the value of the component which gave the good its essential character was $0.39; classification was held to be under a subheading with a unit value of over $3 but not over $5 each. (In the case of sets, the value of the component which gives the set its essential character, and not the value of the entire set, is used to arrive at the unit value. See, *e.g.*, HQ 954414 dated March 25, 1994.)

Holding:

The three-legged iron pedestals with circular or bell-shaped glass inserts are classifiable as other glassware of a kind used for indoor decoration or similar purposes, under subheading 7013.99.40, 7013.99.50, or 7013.99.60, HTSUS, depending on value (value of the entire good, assuming that it is a composite good).

NY 818540 is modified. In accordance with 19 U.S.C. 625(c)(1), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to 19 U.S.C. 625(c)(1) does not constitute a change of practice or position in accordance with section 177.10 (c)(1), Customs Regulations [19 CFR 177.10(c)(1)].

JOHN DURANT,
Director,
Commercial Rulings Division.

[ATTACHMENT L]

DEPARTMENT OF THE TREASURY.
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA-2 RR:CR:GC 961224 PH
Category: Classification
Tariff No. 7013.99 and 9405.50.40

MR. MAURITZ PLENBY
ASSOCIATED MERCHANDISING CORPORATION
1440 Broadway
New York, NY 10018

Re: NY A80401 modified; chair-shaped metal candle holder; tripod metal pedestal with dome-shaped glassware; tripod metal pedestal with plate-shaped glassware; other decorative glassware; glass candle holder; principal use; composite good; essential character; GRI 3(b); Additional U.S. Rule of Interpretation 1(a); ENs Rule 3(b)(IX); 70.13; 94.05.

DEAR MR. PLENBY:

On March 7, 1996, New York Ruling Letter (NY) A80401 was issued to you concerning four items identified in the ruling letter as metal candleholders, style nos. 547536, 547533, 545351, and 547412. You were advised that these items are classifiable in subheading 9405.50.40, Harmonized Tariff Schedule of the United States (HTSUS), as non-electrical lamps and lighting fittings. We have reconsidered this ruling and now believe that it is incorrect insofar as style nos. 547533, 545351, and 547412, which are composed of metal and glass elements, are concerned.

Facts:

NY A80401 described style 547536 as a chair-shape metal candle holder approximately 9½" high and 3¾" wide at its widest dimension with a pointed piece of metal at the midsection of the seat portion of the object. Styles 547533 and 545351 are described as tripod metal holders, respectively 15" and 3" in height, with dome-shaped glass inserts, respectively 5" high with a top diameter of 3¼" and 2" high with a top diameter of 2¼". Style 547412 is described as a tripod metal holder 5" in height with a plate-shaped glass insert measuring about 4½" in diameter.

The classification of style 547536, composed entirely of metal, is not at issue. With respect to the other styles, however, the subheadings under consideration are as follows:

7013.99 Glassware of a kind used for table, kitchen, toilet, office, indoor decoration or similar purposes (other than that of heading 7010 or 7018): * * * Other glassware: * * * Other: * * * Other: * * * Other.

The 1998 general column one rate of duty for goods classifiable under this provision is dependent on the value of the goods (*i.e.*, in subheading 7013.99.40 (valued not over $0.30 each), 38% *ad valorem*, in subheading 7013.99.50 (valued over $0.30 but not over $3 each) 30% *ad valorem*, or under subheading 7013.99.60 (valued over $3 each) 15% *ad valorem* if cut or engraved and valued over $3 but not over $5 each, 7.2% *ad valorem* if cut or engraved and valued over $5 each, 13.5% *ad valorem* if other than cut or engraved and valued over $3 but not over $5 each, or 7.2% *ad valorem* if other than cut or engraved and valued over $5 each).

9405.50.40 Lamps and lighting fittings including searchlights and spotlights and parts thereof, not elsewhere specified or included * * *: * * * Non-electrical lamps and lighting fittings: * * * Other: * * * Other.

The 1998 general column one rate of duty for goods classifiable under this provision is 6.3% *ad valorem*.

Issue:

Are the chair-shaped metal article and the tripod metal items with dome or plate-shaped glass inserts classifiable as other glassware of a kind used for indoor decoration or similar purposes under subheading 7013.99, HTSUS, or as candle holders under subheading 9405.50.40, HTSUS?

Law and Analysis:

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) in accordance with the General Rules of Interpretation (GRIs). GRI 1 states in

part that for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6. Pursuant to GRI 3(b), when goods are *prima facie* classifiable under two or more headings, classification shall be effected as follows:

> (b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

The Harmonized Commodity Description and Coding System Explanatory Notes (ENs) constitute the official interpretation of the Harmonized System. While not legally binding on the contracting parties, and therefore not dispositive, the ENs provide a commentary on the scope of each heading of the Harmonized System and are thus useful in ascertaining the classification of merchandise under the System. Customs believes the ENs should always be consulted. See T.D. 89–80, published in the Federal Register August 23, 1989 (54 FR 35127, 35128).

EN Rule 3(b)(IX) states, in part, that:

> For the purposes of this Rule, composite goods made up of different components shall be taken to mean not only those in which the components are attached to each other to form a practically inseparable whole but also those with separable components, **provided** these components are adapted one to the other and are mutually complementary and that together they form a whole which would not normally be offered for sale in separate parts.

Examples of the latter category of goods are:

> (1) Ashtrays consisting of a stand incorporating a removable ash bowl. * * * [Emphasis in original]

In the case of styles 547533, 545351, and 547412, we are of the opinion that the metal pedestal with glass insert is a composite good. In the absence of more information regarding the styles, we conclude that the components of the articles, the metal pedestals and glass inserts, are adapted one to the other, mutually complementary, and together form a whole which would not normally be offered for sale in separate parts, just as is true of the example given in the EN, an ashtray consisting of a stand with a removable ash bowl. For purposes of this conclusion, we assume that the form of the glass inserts is such that they cannot stand on their own (*i.e.*, because of their rounded bases, the metal pedestals are necessary to keep them in an upright position). Otherwise the glass inserts may not necessarily be complementary to the metal pedestals and each could be offered for sale separately. If so, rather than being composite goods, the metal pedestals with glass inserts would be sets (see EN Rule 3(b)(X)). Whether composite goods or sets, classification is determined on the basis of the component which imparts the essential character.

In general, essential character has been construed to mean the attribute which strongly marks or serves to distinguish what an article is; that which is indispensable to the structure, core or condition of the article. EN Rule 3(b)(VIII) provides factors which help determine the essential character of goods. The factors listed in EN rule 3(b)(VIII) include the nature of the material or component, bulk, quantity, weight or value, or the role of a constituent material in relation to the use of the goods.

Based on the information submitted, we are of the opinion that the essential character of the metal pedestal with glass insert is the glassware. The glassware is the component which distinguishes the article. It is the component which fulfills the function of the article; it holds the object to be displayed (*e.g.*, flowers, plants, potpourri, candles, etc.). The metal pedestal merely supports the glassware. Therefore, the glassware imparts the essential character to items 547533, 545351, and 547412. See HQ 956048 dated July 7, 1994.

Subheading 7013.99, HTSUS, is a use provision, under which articles are classifiable according to the use of the class or kind of goods to which the articles belong. If an article is classifiable according to the use of the class or kind of goods to which it belongs, Additional U.S. Rule of Interpretation 1(a), HTSUS, provides that:

> In the absence of special language or context which otherwise requires—(a) a tariff classification controlled by use (other than actual use) is to be determined in accordance with the use in the United States at, or immediately prior to, the date of importation, of goods of that class or kind to which the imported goods belong, and the controlling use is the principal use.

In other words, the article's principal use in the United States at the time of importation determines whether it is classifiable within a particular class or kind (*principal use* is distinguished from *actual use*; a tariff classification controlled by the latter is satisfied only if such use is intended at the time of importation, the goods are so used and proof thereof is furnished within 3 years after the date the goods are entered (U.S. Additional Note 1(b); 19 CFR 10.131–10.139)).

The Courts have provided factors, which are indicative but not conclusive, to apply when determining whether merchandise falls within a particular class or kind. They include: general physical characteristics, expectation of the ultimate purchaser, channels of trade, environment of sale (accompanying accessories, manner of advertisement and display), use in the same manner as merchandise which defines the class, economic practicality of so using the import, and recognition in the trade of this use. See *Kraft, Inc, v. United States*, 16 CIT 483 (1992), *G. Heileman Brewing Co. v. United States*, 14 CIT 614 (1990), and *United States v. Carborundum Company*, 63 CCPA 98, C.A.D. 1172, 536 F. 2d 373 (1976), *cert. denied*, 429 U.S. 979 (1976).

In applying Additional U.S. Rule of Interpretation 1(a) and the above cases to articles of glass, it is Customs position that, as a general rule, the article's physical form will indicate its principal use and thus to what class or kind it belongs. However, should an exception arise so that an article's physical form does not indicate to what class or kind it belongs or its physical form indicates it belongs to more than one class or kind, Customs considers the other enumerated principal use criteria.

Subheading 7013.99, HTSUS, includes "[g]lassware of a kind used for * * * indoor decoration or similar purposes * * *" (heading 7013; see also, EN 70.13). Thus, insofar as subheading 7013.99, HTSUS, is concerned, the issue is whether or not the principal use of the merchandise is for indoor decoration or similar purposes. As stated above, for glass articles physical form indicates its principal use. If an article's physical form does not indicate to what class or kind it belongs or its physical form indicates it belongs to more than one class or kind, Customs considers the other enumerated principal use criteria.

In the case of items 547533, 545351, and 547412, the physical form is not necessarily that of a candle holder (*e.g.*, there is no "spike" at the bottom of the glass insert to hold the candle (as in the case of item 547536), and the size is greater than that of a standard-sized candle holder (inside diameter of less than 1 inch, depth of approximately 1–1½ inches), enabling the glassware to be used for other, general decorative purposes). Rather, the physical form of the merchandise is that of a general purpose article, which could be used to hold potpourri, flowers, or miscellaneous items, as well as candles (see HQ 956048 dated July 7, 1994, for a similar ruling as to glass vessels with metal iron pedestals of various sizes and styling). Insofar as the other criteria are concerned, although the importer may have provided advertising information as to how *this* merchandise is marketed, the importer has provided no evidence about the *class or kind of merchandise* involved regarding the expectation of the ultimate purchaser, channels of trade, environment of sale, use in the same manner as merchandise which defines the class, economic practicality of so using the import, and recognition in the trade of this use (we note that for principal use what controls is the use of the *class or kind* of articles involved; not the use of the *actual article* involved). This office has recently received evidence of use of similar glassware to hold potpourri (see, *e.g.*, HQs 960819, 961095, 961141).

NY A80401 classified items 547533, 545351, and 547412 under subheading 9405.50.40, HTSUS, as non-electrical lamps and lighting fittings. As stated above, we find that the principal use of those items is as decorative glassware, on the basis of the physical form of the merchandise and evidence since received by this office relating to the other principal use criteria for the class or kind of merchandise involved. Compare to *Lenox Collections v. United States* CIT Slip Op. 96–30, February 2, 1996 (holding that elaborate porcelain containers called the "Spice Village" capable of holding spice were of the class of goods used principally for decorative purposes); *Heileman*, *supra* (holding that although ceramic steins could hold beer, they were chiefly used for ornamental purposes); and *United States v. Baltimore and Ohio R.R. Co.*, 47 CCPA 1, C.A.D. 719 (1959) (holding that although after-dinner coffee cups could hold hot beverages, they were chiefly used for ornamentation on shelves or racks).

In the absence of aspects in the physical form of the glassware involved in styles 547533, 545351, and 547412 which indicate that the principal use of the merchandise is to hold a candle, and in the absence of any evidence from the importer with respect to the other principal use criteria for the class or kind of merchandise, we conclude that the principal use of

the class or kind of those styles is as other glassware used for indoor decoration or similar purposes, under subheading 7013.99, HTSUS.

In the case of unit value provisions, such as subheadings 7013.99.40, 7013.99.50, and 7013.99.60, the value of the entire composite good is used to arrive at the unit value, for purposes of classification. See, *e.g.*, HQ 087878 dated May 20, 1991, in which the total value of a composite good was $4.48 each and the value of the component which gave the good its essential character was $0.39; classification was held to be under a subheading with a unit value of over $3 but not over $5 each. (In the case of sets, the value of the component which gives the set its essential character, and not the value of the entire set, is used to arrive at the unit value. See, *e.g.*, HQ 954414 dated March 25, 1994.)

As previously noted, the classification of style 547536, the chair-shaped metal article, is not at issue. We believe that the classification of this style in NY A80401, in subheading 9405.50.40, HTSUS, the provision for other non-electrical lamps and lighting fittings, is correct.

Holdings:

(1) The chair-shaped metal article (style 547536) is classifiable as an other non-electrical lamp and lighting fitting, in subheading 9405.50.40, HTSUS.

(2) The tripod metal items with dome or plate-shaped glass inserts (styles 547533, 545351, and 547412) are classifiable as other glassware of a kind used for indoor decoration or similar purposes, under subheading 7013.99.40, 7013.99.50, or 7013.99.60, HTSUS, depending on value (value of the entire good, assuming that it is a composite good).

NY A80401 is modified. In accordance with 19 U.S.C. 625(c)(1), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to 19 U.S.C. 625(c)(1) does not constitute a change of practice or position in accordance with section 177.10 (c)(1), Customs Regulations [19 CFR 177.10(c)(1)].

JOHN DURANT,
Director,
Commercial Rulings Division.

[ATTACHMENT M]

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:CR:GC 961225 PH
Category: Classification
Tariff No. 7013.99 and 9405.50.40

MS. ASTRA GALINS
CYRK, INC.
3 Pond Road
Gloucester, MA 01930

Re: NY A84166 revoked; tripod metal holder with dome-shaped glass insert; other decorative glassware; glass candle holder; principal use; composite good; essential character; GRI 3(b); Additional U.S. Rule of Interpretation 1(a); ENs Rule 3(b)(IX); 70.13; 94.05.

DEAR MS. GALINS:

On June 28, 1996, New York Ruling Letter (NY) A84166 was issued to you concerning a metal tripod article with a dome-shaped piece of glassware. You were advised that the merchandise was classifiable in subheading 9405.50.40, Harmonized Tariff Schedule of the United States (HTSUS), as non-electrical lamps and lighting fittings. We have reconsidered this ruling and now believe that it is incorrect.

Facts:

NY A84166 described the merchandise as a tripod-shape metal holder approximately 5″ in height with a dome-shape glass insert measuring nearly 3¾″ in height with a top diameter of 3¾″.

The subheadings under consideration are as follows:

7013.99 Glassware of a kind used for table, kitchen, toilet, office, indoor decoration or similar purposes (other than that of heading 7010 or 7018): * * * Other glassware: * * * Other: * * * Other: * * * Other.

The 1998 general column one rate of duty for goods classifiable under this provision is dependent on the value of the goods (*i.e.*, in subheading 7013.99.40 (valued not over $0.30 each), 38% *ad valorem*, in subheading 7013.99.50 (valued over $0.30 but not over $3 each) 30% *ad valorem*, or under subheading 7013.99.60 (valued over $3 each) 15% *ad valorem* if cut or engraved and valued over $3 but not over $5 each, 7.2% *ad valorem* if cut or engraved and valued over $5 each, 13.5% *ad valorem* if other than cut or engraved and valued over $3 but not over $5 each, or 7.2% *ad valorem* if other than cut or engraved and valued over $5 each).

9405.50.40 Lamps and lighting fittings including searchlights and spotlights and parts thereof, not elsewhere specified or included * * *: * * * Non-electrical lamps and lighting fittings: * * * Other: * * * Other.

The 1998 general column one rate of duty for goods classifiable under this provision is 6.3% *ad valorem*.

Issue:

Is the metal tripod article with a dome-shape glass insert classifiable as other glassware of a kind used for indoor decoration or similar purposes under subheading 7013.99, HTSUS, or as candle holders under subheading 9405.50.40, HTSUS?

Law and Analysis:

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) in accordance with the General Rules of Interpretation (GRIs). GRI 1 states in part that for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6. Pursuant to GRI 3(b), when goods are *prima facie* classifiable under two or more headings, classification shall be effected as follows:

> (b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

The Harmonized Commodity Description and Coding System Explanatory Notes (ENs) constitute the official interpretation of the Harmonized System. While not legally binding on the contracting parties, and therefore not dispositive, the ENs provide a commentary on the scope of each heading of the Harmonized System and are thus useful in ascertaining the classification of merchandise under the System. Customs believes the ENs should always be consulted. See T.D. 89–80, published in the Federal Register August 23, 1989 (54 FR 35127, 35128).

EN Rule 3(b)(IX) states, in part, that:

> For the purposes of this Rule, composite goods made up of different components shall be taken to mean not only those in which the components are attached to each other to form a practically inseparable whole but also those with separable components, **provided** these components are adapted one to the other and are mutually complementary and that together they form a whole which would not normally be offered for sale in separate parts.
>
> Examples of the latter category of goods are:
>
> (1) Ashtrays consisting of a stand incorporating a removable ash bowl. * * * [Emphasis in original]

In this case, we are of the opinion that the metal pedestal with glass insert is a composite good. In the absence of more information regarding the items, we conclude that the components of the article, the metal pedestal and glass insert, are adapted one to the other, mutually complementary, and together form a whole which would not normally be offered for sale in separate parts, just as is true of the example given in the EN, an ashtray consisting of a stand with a removable ash bowl. For purposes of this conclusion, we assume that the form of the glass insert is such that it cannot stand on its own (*i.e.*, because of its rounded base, the metal pedestal is necessary to keep it in an upright position). Otherwise the glass

insert may not necessarily be complementary to the metal pedestal and each could be offered for sale separately. If so, rather than being a composite good, the metal pedestal with glass insert would be a set (see EN Rule 3(b)(X)). Whether a composite good or set, classification is determined on the basis of the component which imparts the essential character.

In general, essential character has been construed to mean the attribute which strongly marks or serves to distinguish what an article is; that which is indispensable to the structure, core or condition of the article. EN Rule 3(b)(VIII) provides factors which help determine the essential character of goods. The factors listed in EN rule 3(b)(VIII) include the nature of the material or component, bulk, quantity, weight or value, or the role of a constituent material in relation to the use of the goods.

Based on the information submitted, we are of the opinion that the essential character of the metal pedestal with glass insert is the glassware. The glassware is the component which distinguishes the article. It is the component which fulfills the function of the article; it holds the object to be displayed (*e.g.*, flowers, plants, potpourri, candles, etc.). The metal pedestal merely supports the glassware. Therefore, the glassware imparts the essential character to the merchandise. See HQ 956048 dated July 7, 1994.

Subheading 7013.99, HTSUS, is a use provision, under which articles are classifiable according to the use of the class or kind of goods to which the articles belong. If an article is classifiable according to the use of the class or kind of goods to which it belongs, Additional U.S. Rule of Interpretation 1(a), HTSUS, provides that:

> In the absence of special language or context which otherwise requires—(a) a tariff classification controlled by use (other than actual use) is to be determined in accordance with the use in the United States at, or immediately prior to, the date of importation, of goods of that class or kind to which the imported goods belong, and the controlling use is the principal use.

In other words, the article's principal use in the United States at the time of importation determines whether it is classifiable within a particular class or kind (*principal use* is distinguished from *actual use*; a tariff classification controlled by the latter is satisfied only if such use is intended at the time of importation, the goods are so used and proof thereof is furnished within 3 years after the date the goods are entered (U.S. Additional Note 1(b); 19 CFR 10.131–10.139)).

The Courts have provided factors, which are indicative but not conclusive, to apply when determining whether merchandise falls within a particular class or kind. They include: general physical characteristics, expectation of the ultimate purchaser, channels of trade, environment of sale (accompanying accessories, manner of advertisement and display), use in the same manner as merchandise which defines the class, economic practicality of so using the import, and recognition in the trade of this use. See *Kraft, Inc, v. United States*, 16 CIT 483 (1992), *G. Heileman Brewing Co. v. United States*, 14 CIT 614 (1990), and *United States v. Carborundum Company*, 63 CCPA 98, C.A.D. 1172, 536 F. 2d 373 (1976), *cert. denied*, 429 U.S. 979 (1976).

In applying Additional U.S. Rule of Interpretation 1(a) and the above cases to articles of glass, it is Customs position that, as a general rule, the article's physical form will indicate its principal use and thus to what class or kind it belongs. However, should an exception arise so that an article's physical form does not indicate to what class or kind it belongs or its physical form indicates it belongs to more than one class or kind, Customs considers the other enumerated principal use criteria.

Subheading 7013.99, HTSUS, includes "[g]lassware of a kind used for * * * indoor decoration or similar purposes * * *" (heading 7013; see also, EN 70.13). Thus, insofar as subheading 7013.99, HTSUS, is concerned, the issue is whether or not the principal use of the merchandise is for indoor decoration or similar purposes. As stated above, for glass articles physical form indicates its principal use. If an article's physical form does not indicate to what class or kind it belongs or its physical form indicates it belongs to more than one class or kind, Customs considers the other enumerated principal use criteria.

In this case, the physical form is not necessarily that of a candle holder (*e.g.*, there is no "spike" at the bottom of the glass insert to hold the candle, and the size is greater than that of a standard-sized candle holder (inside diameter of less than 1 inch, depth of approximately 1–1½ inches), enabling the glassware to be used for other, general decorative purposes). Rather, the physical form of the merchandise is that of a general purpose article, which could be used to hold potpourri, flowers, or miscellaneous items, as well as candles (see HQ 956048 dated July 7, 1994, for a similar ruling as to glass vessels with metal iron pedestals of various sizes and styling). Insofar as the other criteria are concerned, the importer has

provided no evidence about the *class or kind of merchandise* involved regarding the expectation of the ultimate purchaser, channels of trade, environment of sale, use in the same manner as merchandise which defines the class, economic practicality of so using the import, and recognition in the trade of this use (we note that for principal use what controls is the use of the *class or kind* of articles involved; not the use of the *actual article* involved). This office has recently received evidence of use of similar glassware to hold potpourri (see, *e.g.*, HQs 960819, 961095, 961141).

NY A84166 classified the merchandise under consideration under subheading 9405.50.40, HTSUS, as non-electrical lamps and lighting fittings. As stated above, we find that the principal use of the merchandise is as decorative glassware, on the basis of the physical form of the merchandise and evidence since received by this office relating to the other principal use criteria for the class or kind of merchandise involved. Compare to *Lenox Collections v. United States* CIT Slip Op. 96–30, February 2, 1996 (holding that elaborate porcelain containers called the "Spice Village" capable of holding spice were of the class of goods used principally for decorative purposes); *Heileman supra* (holding that although ceramic steins could hold beer, they were chiefly used for ornamental purposes); and *United States v. Baltimore and Ohio R.R. Co.*, 47 CCPA 1, C.A.D. 719 (1959) (holding that although after-dinner coffee cups could hold hot beverages, they were chiefly used for ornamentation on shelves or racks).

In the absence of aspects of the physical form of the merchandise under consideration which indicate that the principal use of the merchandise is to hold a candle, and in the absence of any evidence from the importer with respect to the other principal use criteria for the class or kind of merchandise, we conclude that the principal use of the class or kind of the merchandise under consideration is as other glassware used for indoor decoration or similar purposes, in subheading 7013.99, HTSUS.

In the case of unit value provisions, such as subheadings 7013.99.40, 7013.99.50, and 7013.99.60, the value of the entire composite good is used to arrive at the unit value, for purposes of classification. See, *e.g.*, HQ 087878 dated May 20, 1991, in which the total value of a composite good was $4.48 each and the value of the component which gave the good its essential character was $0.39; classification was held to be under a subheading with a unit value of over $3 but not over $5 each. (In the case of sets, the value of the component which gives the set its essential character, and not the value of the entire set, is used to arrive at the unit value. See, *e.g.*, HQ 954414 dated March 25, 1994.)

Holding:

The metal tripod article with a dome-shape glass insert is classifiable as other glassware of a kind used for indoor decoration or similar purposes, under subheading 7013.99.40, 7013.99.50, 7013.99.60, HTSUS, depending on value (value of the entire good, assuming that it is a composite good).

NY A84166 is revoked. In accordance with 19 U.S.C. 625(c)(1), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to 19 U.S.C. 625(c)(1) does not constitute a change of practice or position in accordance with section 177.10 (c)(1), Customs Regulations [19 CFR 177.10(c)(1)].

JOHN DURANT,
Director,
Commercial Rulings Division.

[ATTACHMENT N]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.
CLA–2 RR:CR:GC 961226 PH
Category: Classification
Tariff No. 7013.99 and 9405.50.40

MR. MAURITZ PLENB
YARNC
1440 Broadway
New York, NY 10018

Re: NY 815064 revoked; metal iron pedestals with bell or disk-shaped glass inserts; other decorative glassware; glass candle holder; principal use; composite good; essential character; GRI 3(b); Additional U.S. Rule of Interpretation 1(a); ENs Rule 3(b)(IX); 70.13; 94.05.

DEAR MR. PLENBY:

On October 17, 1996, New York Ruling Letter (NY) 815064 was issued to you concerning items "octavio" and "EK7". You were advised that the merchandise was classifiable in subheading 9405.50.40, Harmonized Tariff Schedule of the United States (HTSUS), as non-electrical lamps and lighting fittings. We have reconsidered this ruling and now believe that it is incorrect.

Facts:

NY 815064 described the "octavio" item as consisting of a black wrought iron stand 6.1" in height with a bell-shape glass insert measuring 2.75" in diameter and 4" in height and the "EK7" item as consisting of a black wrought iron stand, with a "brass" look, 7.2" in height with a disk-shaped glass insert measuring 2.5" in diameter and 1.9" in height. Both of these items are stated to be marketed and sold as candle holders.

The subheadings under consideration are as follows:

7013.99 Glassware of a kind used for table, kitchen, toilet, office, indoor decoration or similar purposes (other than that of heading 7010 or 7018): * * * Other glassware: * * * Other: * * * Other: * * * Other.

The 1998 general column one rate of duty for goods classifiable under this provision is dependent on the value of the goods (*i.e.*, in subheading 7013.99.40 (valued not over $0.30 each), 38% *ad valorem*, in subheading 7013.99.50 (valued over $0.30 but not over $3 each) 30% *ad valorem*, or under subheading 7013.99.60 (valued over $3 each) 15% *ad valorem* if cut or engraved and valued over $3 but not over $5 each, 7.2% *ad valorem* if cut or engraved and valued over $5 each, 13.5% *ad valorem* if other than cut or engraved and valued over $3 but not over $5 each, or 7.2% *ad valorem* if other than cut or engraved and valued over $5 each).

9405.50.40 Lamps and lighting fittings including searchlights and spotlights and parts thereof, not elsewhere specified or included * * *: * * * Non-electrical lamps and lighting fittings: * * * Other: * * * Other.

The 1998 general column one rate of duty for goods classifiable under this provision is 6.3% *ad valorem*.

Issue:

Are the iron pedestals with bell or disk-shaped glass inserts classifiable as other glassware of a kind used for indoor decoration or similar purposes under subheading 7013.99, HTSUS, or as candle holders under subheading 9405.50.40, HTSUS?

Law and Analysis:

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) in accordance with the General Rules of Interpretation (GRIs). GRI 1 states in part that for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6. Pursuant to GRI 3(b), when goods are *prima facie* classifiable under two or more headings, classification shall be effected as follows:

(b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by ref-

> erence to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

The Harmonized Commodity Description and Coding System Explanatory Notes (ENs) constitute the official interpretation of the Harmonized System. While not legally binding on the contracting parties, and therefore not dispositive, the ENs provide a commentary on the scope of each heading of the Harmonized System and are thus useful in ascertaining the classification of merchandise under the System. Customs believes the ENs should always be consulted. See T.D. 89–80, published in the Federal Register August 23, 1989 (54 FR 35127, 35128).

EN Rule 3(b)(IX) states, in part, that:

> For the purposes of this Rule, composite goods made up of different components shall be taken to mean not only those in which the components are attached to each other to form a practically inseparable whole but also those with separable components, **provided** these components are adapted one to the other and are mutually complementary and that together they form a whole which would not normally be offered for sale in separate parts.
>
> Examples of the latter category of goods are:
>
> (1) Ashtrays consisting of a stand incorporating a removable ash bowl. * * * [Emphasis in original]

In this case, we are of the opinion that the metal pedestals with glass inserts are composite goods. In the absence of more information regarding the items, we conclude that the components of the articles, the metal pedestals and glass inserts, are adapted one to the other, mutually complementary, and together form a whole which would not normally be offered for sale in separate parts, just as is true of the example given in the EN, an ashtray consisting of a stand with a removable ash bowl. For purposes of this conclusion, we assume that the form of the glass inserts is such that they cannot stand on their own (*i.e.*, because of their rounded bases, the metal pedestals are necessary to keep them in an upright position). Otherwise the glass inserts may not necessarily be complementary to the metal pedestals and each could be offered for sale separately. If so, rather than being composite goods, the metal pedestals with glass inserts would be sets (see EN Rule 3(b)(X)). Whether composite goods or sets, classification is determined on the basis of the component which imparts the essential character.

In general, essential character has been construed to mean the attribute which strongly marks or serves to distinguish what an article is; that which is indispensable to the structure, core or condition of the article. EN Rule 3(b)(VIII) provides factors which help determine the essential character of goods. The factors listed in EN rule 3(b)(VIII) include the nature of the material or component, bulk, quantity, weight or value, or the role of a constituent material in relation to the use of the goods.

Based on the information submitted, we are of the opinion that the essential character of the metal pedestals with glass inserts is the glassware. The glassware is the component which distinguishes the articles. It is the component which fulfills the function of the articles; it holds the object to be displayed (*e.g.*, flowers, plants, potpourri, candles, etc.). The metal pedestals merely support the glassware. Therefore, the glassware imparts the essential character to the merchandise. See HQ 956048 dated July 7, 1994.

Subheading 7013.99, HTSUS, is a use provision, under which articles are classifiable according to the use of the class or kind of goods to which the articles belong. If an article is classifiable according to the use of the class or kind of goods to which it belongs, Additional U.S. Rule of Interpretation 1(a), HTSUS, provides that:

> In the absence of special language or context which otherwise requires—(a) a tariff classification controlled by use (other than actual use) is to be determined in accordance with the use in the United States at, or immediately prior to, the date of importation, of goods of that class or kind to which the imported goods belong, and the controlling use is the principal use.

In other words, the article's principal use in the United States at the time of importation determines whether it is classifiable within a particular class or kind (*principal use* is distinguished from *actual use*; a tariff classification controlled by the latter is satisfied only if such use is intended at the time of importation, the goods are so used and proof thereof is furnished within 3 years after the date the goods are entered (U.S. Additional Note 1(b); 19 CFR 10.131–10.139)).

The Courts have provided factors, which are indicative but not conclusive, to apply when determining whether merchandise falls within a particular class or kind. They include:

general physical characteristics, expectation of the ultimate purchaser, channels of trade, environment of sale (accompanying accessories, manner of advertisement and display), use in the same manner as merchandise which defines the class, economic practicality of so using the import, and recognition in the trade of this use. See *Kraft, Inc, v. United States*, 16 CIT 483 (1992), *G. Heileman Brewing Co. v. United States*, 14 CIT 614 (1990), and *United States v. Carborundum Company*, 63 CCPA 98, C.A.D. 1172, 536 F. 2d 373 (1976), *cert. denied*, 429 U.S. 979 (1976).

In applying Additional U.S. Rule of Interpretation 1(a) and the above cases to articles of glass, it is Customs position that, as a general rule, the article's physical form will indicate its principal use and thus to what class or kind it belongs. However, should an exception arise so that an article's physical form does not indicate to what class or kind it belongs or its physical form indicates it belongs to more than one class or kind, Customs considers the other enumerated principal use criteria.

Subheading 7013.99, HTSUS, includes "[g]lassware of a kind used for * * * indoor decoration or similar purposes * * *" (heading 7013; see also, EN 70.13). Thus, insofar as subheading 7013.99, HTSUS, is concerned, the issue is whether or not the principal use of the merchandise is for indoor decoration or similar purposes. As stated above, for glass articles physical form indicates its principal use. If an article's physical form does not indicate to what class or kind it belongs or its physical form indicates it belongs to more than one class or kind, Customs considers the other enumerated principal use criteria.

In this case, the physical form is not necessarily that of a candle holder (*e.g.*, there is no "spike" at the bottom of the glass insert to hold the candle, and the size is greater than that of a standard-sized candle holder (inside diameter of less than 1 inch, depth of approximately 1–1½ inches), enabling the glassware to be used for other, general decorative purposes). Rather, the physical form of the merchandise is that of a general purpose article, which could be used to hold potpourri, flowers, or miscellaneous items, as well as candles (see HQ 956048 dated July 7, 1994, for a similar ruling as to glass vessels with metal iron pedestals of various sizes and styling). Insofar as the other criteria are concerned, although information may have been provided as to how *this* merchandise is marketed, the importer has provided no evidence about the *class or kind of merchandise* involved regarding the expectation of the ultimate purchaser, channels of trade, environment of sale, use in the same manner as merchandise which defines the class, economic practicality of so using the import, and recognition in the trade of this use (we note that for principal use what controls is the use of the *class or kind* of articles involved; not the use of the *actual article* involved). This office has recently received evidence of use of similar glassware to hold potpourri (see, *e.g.*, HQs 960819, 961095, 961141).

NY 815064 classified the merchandise under consideration under subheading 9405.50.40, HTSUS, as non-electrical lamps and lighting fittings. As stated above, we find that the principal use of the merchandise is as decorative glassware, on the basis of the physical form of the merchandise and evidence since received by this office relating to the other principal use criteria for the class or kind of merchandise involved. Compare to *Lenox Collections v. United States* CIT Slip Op. 96–30, February 2, 1996 (holding that elaborate porcelain containers called the "Spice Village" capable of holding spice were of the class of goods used principally for decorative purposes); *Heileman*, *supra* (holding that although ceramic steins could hold beer, they were chiefly used for ornamental purposes); and *United States v. Baltimore and Ohio R.R. Co.*, 47 CCPA 1, C.A.D. 719 (1959) (holding that although after-dinner coffee cups could hold hot beverages, they were chiefly used for ornamentation on shelves or racks).

In the absence of aspects of the physical form of the merchandise under consideration which indicate that the principal use of the merchandise is to hold a candle, and in the absence of any evidence from the importer with respect to the other principal use criteria for the class or kind of merchandise, we conclude that the principal use of the class or kind of the merchandise under consideration is as other glassware used for indoor decoration or similar purposes, in subheading 7013.99, HTSUS.

In the case of unit value provisions, such as subheadings 7013.99.40, 7013.99.50, and 7013.99.60, the value of the entire composite good is used to arrive at the unit value, for purposes of classification. See, *e.g.*, HQ 087878 dated May 20, 1991, in which the total value of a composite good was $4.48 each and the value of the component which gave the good its essential character was $0.39; classification was held to be under a subheading with a unit value of over $3 but not over $5 each. (In the case of sets, the value of the component which

gives the set its essential character, and not the value of the entire set, is used to arrive at the unit value. See, *e.g.*, HQ 954414 dated March 25, 1994.)

Holding:

The iron pedestals with bell or disk-shaped glass inserts are classifiable as other glassware of a kind used for indoor decoration or similar purposes, under subheading 7013.99.40, 7013.99.50, or 7013.99.60, HTSUS, depending on value (value of the entire good, assuming that it is a composite good).

NY 815064 is revoked. In accordance with 19 U.S.C. 625(c)(1), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to 19 U.S.C. 625(c)(1) does not constitute a change of practice or position in accordance with section 177.10 (c)(1), Customs Regulations [19 CFR 177.10(c)(1)].

JOHN DURANT,
Director,
Commercial Rulings Division.

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Gregory W. Carman

Judges

Jane A. Restani
Thomas J. Aquilino, Jr.
Richard W. Goldberg
Donald C. Pogue
Evan J. Wallach

Senior Judges

James L. Watson

Herbert N. Maletz

Bernard Newman

Dominick L. DiCarlo

Nicholas Tsoucalas

R. Kenton Musgrave

Clerk

Raymond F. Burghardt

Decisions of the United States Court of International Trade

(Slip Op. 98–15)

WINTER-WOLFF, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 95–12–01712

[Judgment for plaintiff.]

(Dated February 20, 1998)

Barnes, Richardson & Colburn, (James S. O'Kelly and *Christopher E. Pey)* for plaintiff.
Frank W. Hunger, Assistant Attorney General; *Joseph I. Liebman,* Attorney-in-Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice; Office of the Assistant Chief Counsel, International Trade Litigation, United States Customs Service *(Beth C. Brotman),* of counsel, for defendant.

OPINION

GOLDBERG, *Judge:* Plaintiff importer, Winter-Wolff, Inc., ("Winter-Wolff") challenges the United States Customs Service's ("Customs") classification of laser-treated aluminum capacitor foil imported from Switzerland in 1995.

In response to plaintiff's request for a ruling, the District Director at the port of Ogdensburg, New York, classified the laser-treated foil as aluminum foil, *not further worked*, under Harmonized Tariff Schedule of the United States ("HTSUS") subheading 7607.11.30, dutiable at a rate of 5.8% *ad valorem*. Plaintiff filed a timely protest of the ruling with Customs headquarters. Customs affirmed the District Director's ruling in HQ 958058, dated September 29, 1995.

Winter-Wolff then filed a timely appeal of Customs' decision, claiming the laser treatment constitutes "further working" and, as a result, the merchandise falls outside the ambit of HTSUS subheading 7607.11.30 and, instead, is properly classified under subheading 7607.19.60, dutiable at a rate of 3% *ad valorem*. Pursuant to 28 U.S.C. § 2640(a)(1) (1994), trial ensued on October 22 and 23, 1997. The Court exercises jurisdiction in this matter under 28 U.S.C. § 1581(a) (1994). The Court finds for plaintiff.

I.

ISSUES PRESENTED

Plaintiff claims the aluminum foil is "further worked" by the laser treatment and thus falls outside HTSUS subheading 7607.11.30, a tariff

provision that requires applicable merchandise to be "not further worked." Instead, plaintiff contends the imports, as "further worked," are within the purview of HTSUS subheading 7607.19.60 and are properly dutiable at 3% *ad valorem*. Plaintiff maintains the common, dictionary meaning of the term "further worked" mandates this conclusion. To support this argument, plaintiff called three witnesses at trial: (1) Mr. Hans K. Sprunger, International Sales Manager for Lawson Mardon Neher AG ("Neher"), the producer of the laser-treated foil; (2) Mr. Daniel E. Weil, Manager of Winter-Wolff, Inc.; and (3) Mr. Herman Fletcher Jr., General Manager for Capacitor Products at Cooper Power Systems ("Cooper"), a capacitor manufacturer.

The government, on the other hand, asserts the meaning of the term "further worked" as defined in the commercial, metallurgical sense validates Customs' classification. As support for this argument, the government relies upon the testimony of one expert witness, Dr. Michael McNallan. Alternatively, the government submits that the laser treatment cuts the foil to shape such that the merchandise should be classified as capacitor foil that has been "cut-to-shape" under HTSUS subheading 7607.19.30, dutiable at a rate of 5.7% *ad valorem*.

This case boils down to one issue—whether the classification decision should be guided by the dictionary meaning or the commercial meaning of the tariff term "further worked." Resolution of this issue settles the following questions: (1) whether Customs correctly classified the imported foil under 7607.11.30, "Aluminum foil * * * rolled but not further worked," or whether the laser treatment on the imported merchandise constitutes "further working" within the meaning of Heading 7607, HTSUS?; and (2) whether, in the event the imported merchandise is found to have been "further worked," it has also been "cut to shape" such that it should be classified under subheading 7607.19.30 with a dutiable rate of 5.7% *ad valorem*?

II.

BACKGROUND

The merchandise at issue is aluminum foil for capacitors imported in rolls of widths of 228mm to 635mm, all of which are less than 0.01mm thick, that has been slit by a laser treatment. The laser-treated foil is produced in Switzerland by Neher. Manufacture of all aluminum capacitor foil, including the laser-treated variety at issue here, involves a multi-step process. First, foil stock is annealed, cooled, and rolled several times to reduce the thickness. Next, the foil stock is double rolled, *i.e.*, two layers of foil stock are rolled at the same time, to further reduce the thickness of the merchandise. The foil is then rewound and slit with mechanical knives to desired widths.

At this point, the capacitor foil may be sold, and is sold, without the laser treatment. Foil sold at this point is referred to as "hard" or "wet" (*i.e.*, foil with rolling oils) capacitor foil. If it is not sold at this stage, the foil is further annealed to remove certain oils and either sold or placed in inventory. From inventory, the foil is readied for sale in one of two man-

ners: (1) as "soft" or "dry" capacitor foil, or (2) as laser-treated capacitor foil. If the foil is sold as "soft/dry" capacitor foil, the foil is simply removed from inventory and sold as is. The laser-treated foil, however, must undergo an additional process before shipment. Specifically, the foil is removed from inventory and passed beneath a laser. As the foil passes under the laser, the laser melts one of the foil's edges. The laser-treated side of the foil is distinguished by its rounded edge, which stands in contrast to the rough edges found on foil slit by knives. *See* Pl.'s Ex. 6. Importantly, while one edge of the foil passes under the laser, the other edge is simultaneously mechanically sheared by knives.

As its name suggests, capacitor foil is a type of aluminum foil dedicated for end use in capacitors. Capacitors are devices used by electrical utility companies to store electric energy. Capacitors may be found at substations for electrical utilities as well as on some overhead distribution lines. Electrical utilities use the capacitors to compensate for inherent deficiencies in A/C power lines. More specifically, when transferring electricity from a generator to a customer, power lines often introduce an inductive current that may cause voltages to drop. Capacitors, as electrical opposites, cancel out the inductive current in the lines and, hence, function as valuable components for electrical utilities.

Capacitors are manufactured using polypropylene film and aluminum capacitor foil. The film and foil are wound together in packs. Several of the packs are then placed in stainless steel tanks that are sealed, vacuum processed, and painted to make a capacitor. Two of plaintiff's witnesses, Mr. Sprunger and Mr. Fletcher, testified that the laser-treated foil is preferred by high-voltage capacitor manufacturers because the rounded edges, unlike the knife-slit edges, increase the discharge inception voltage ("DIV") performance of capacitors. Superior DIV performance is preferred by electrical utilities because it diminishes the possibility that the capacitor will experience a phenomena known as dielectric breakdown or "corona," the leading cause of capacitor failures.

III.

Standard of Review

The factual portion of a Customs' classification decision enjoys a statutory presumption of correctness; the importer plaintiff has the burden of proving otherwise. 28 U.S.C. § 2639(a)(1) (1994); *Anhydrides & Chems., Inc. v. United States*, ___ Fed. Cir. (T) ___, ___, 130 F.3d 1481, 1485–86 (1997); *Goodman Mfg., L.P. v. United States*, ___ Fed. Cir. (T) ___, ___, 69 F.3d 505, 508 (1995) (statutory presumption of correctness is limited to factual determinations). Pursuant to 28 U.S.C. § 2640(a), however, the legal basis for Customs' classification decision is subject to *de novo* review. Indeed, the Court has a statutory duty when it reviews classification decisions to find the correct result. 28 U.S.C. § 2643(b); *Rollerblade, Inc. v. United States*, ___ Fed. Cir. (T) ___, ___, 112 F.3d 481, 484 (1997). In making this determination, the Court must consider "whether the government's classification is correct, both

independently and in comparison with the importer's alternative." *Jarvis Clark Co. v. United States*, 2 Fed. Cir. (T) 70, 75, 733 F.2d 873, 878 (1984). Because the parties do not dispute Customs' factual findings here, the presumption of correctness is not relevant. This case is reviewed *de novo*.

IV.

DISCUSSION

This case requires the Court to determine the correct meaning of the term "further worked" as it appears in HTSUS subheading 7607.11.30. "[T]he meaning of a tariff term is a question of law." *Brookside Veneers, Ltd. v. United States*, 6 Fed. Cir. (T) 121, 124, 847 F.2d 786, 788 (1988). It is fundamental that a court should determine the correct classification of a tariff term by first turning to the terms of the statute, *i.e.*, the HTSUS, and its legislative history, *i.e.*, the relevant Chapter and Section Notes. *See, e.g., Lynteq, Inc. v. United States*, 10 Fed. Cir. (T) 112, 115, 976 F.2d 693, 696 (1992) (citations omitted); *see also* GRI 1, HTSUS (providing that "classification shall be determined according to the terms of the headings and any relative section or chapter notes * * *."). When, however, a tariff term is not clearly defined by the statute or its legislative history, it is also fundamental that the correct meaning of the tariff term is "presumed to be the same as its common or dictionary meaning in the absence of evidence to the contrary." *Rohm & Haas Co. v. United States*, 2 Fed. Cir. (T) 28, 29, 727 F.2d 1095, 1097 (1984) (quoting *Bentkamp v. United States*, 40 C.C.P.A. 70, 78 (1952) (citation omitted)). *See also Mita Copystar America v. United States*, ____ Fed. Cir. (T) ____, ____, 21 F.3d 1079, 1082 (1994); *Brookside Veneers*, 6 Fed. Cir. (T) at 125, 847 F.2d at 789 (citation omitted).

In ascertaining the meaning of a tariff term, it is also presumed that the commercial meaning of the term is the same as its common meaning. *Motor Wheel Corp. v. United States*, 19 CIT 385, 388 (1995) (citing *Nippon Kogaku (USA), Inc. v. United States*, 69 C.C.P.A. 89, 92, 673 F.2d 380, 382 (1982)); *Daniel Green Shoe Co. v. United States*, 58 Cust. Ct. 7, 14, 262 F. Supp. 375, 380 (1967) (citing *United States v. M.J. Brandenstein & Co.*, 17 C.C.P.A. 480, 485 (1930); *Hummel Chem. Co. v. United States*, 29 C.C.P.A. 178, 183 (1941)). Yet, in those instances where the common and commercial meanings differ, the party who argues that the term "should not be given its common or dictionary meaning must prove that there is a different commercial meaning in existence which is definite, uniform, and general throughout the trade." *Rohm & Haas*, 2 Fed. Cir. (T) at 29, 727 F.2d at 1097 (quoting *Moscahlades Bros. v. United States*, 42 C.C.P.A. 78, 82 (1954) (internal quotations omitted)). *See also Central Prods. Co. v. United States*, 20 CIT ____, ____, 936 F. Supp. 1002, 1004 (1996) (citations omitted); *S.G.B. Steel Scaffolding & Shoring Co., v. United States*, 82 Cust. Ct. 197, 206 (1979) (citations omitted). For the party carrying the burden, "[p]roof of commercial designation is a question of fact to be established in each case." *Rohm & Haas*, 2 Fed. Cir. (T)

at 29, 727 F.2d at 1097 (quoting *S.G.B. Steel*, 82 Cust. Ct. at 206 (and cases cited therein)).

In view of the foregoing principles, the framework for analysis in this case is set. Since neither the language of tariff heading 7607 nor the Chapter or Section Notes define "further worked," the Court must look elsewhere to discern its meaning.[1] The parties advance "common meanings" of the term "further worked," but one reflects the "dictionary" meaning while the other purportedly reflects the "commercial" meaning. In essence then, this is a case where the presumption that the commercial and common meaning of the term are the same does not hold. Here, the proffered commercial meaning differs from the common, dictionary meaning of the term. Accordingly, the Court must consider if the proffered commercial meaning is "definite, uniform, and general" throughout the trade. *See Rohm & Haas*, *supra*.

Defendant, as the party attempting to establish the commercial meaning in this case, has the burden of proof. If defendant satisfies its burden, the Court will assess whether the laser treatment constitutes "further working" within the commercial meaning. If, however, the Court finds defendant fails to satisfy its burden, the Court must identify the appropriate common, dictionary meaning of the term and then must consider whether the laser treatment meets the term's common or dictionary meaning. Finally, if the Court deems the merchandise "further worked" within either the commercial or dictionary meaning, the Court must consider defendant's alternative classification argument; that is, whether the merchandise is "cut-to-shape" by the laser treatment.

Following this framework, the Court concludes that defendant has not satisfied its burden. It has not established that a general, uniform "commercial" meaning of the term "further worked" exists that should be used in this case. Instead, the Court holds that the term should be defined in accord with its common, dictionary meaning for purposes of HTSUS subheading 7607.11, and that plaintiff's merchandise is "further worked" within this meaning. Finally, the Court concludes the merchandise at issue has not been "cut-to-shape" and, thus, finds defendant's alternative classification argument unpersuasive.

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[1] Both parties suggest that the Court look to the Explanatory Note to HTSUS subheading 7607.11 to find the meaning of the term "further worked." The Explanatory Note at issue lists the following processes as "not further worked" within the meaning of subheading 7607.11: cold-rolling, hot-rolling, heat treatments, separation, chemical cleaning or washing, and trimming, slitting, or cutting into rectangular shapes. Winter-Wolff argues that since the laser treatment is not specifically listed as one that constitutes "not further worked," the laser-treatment *a fortiori* amounts to "working." *See Pl.'s Pre-Trial Mem.*, at 11–12. On the other hand, the government argues that the laser treatment constitutes a more advanced form of one of the processes listed in the Note, and that tariff terms are meant to incorporate product advancements. *See Def.'s Pre-Trial Mem.*, at 23.

The Court declines to take guidance from the Explanatory Note to HTSUS subheading 7607.11. First, although they may be used to clarify the scope of terms, it is well established that Explanatory Notes, unlike Chapter or Section Notes, are neither dispositive nor controlling legislative history. *See, e.g., Midwest of Cannon Falls, Inc. v. United States*, ___ Fed. Cir. (T) ___, ___, 122 F.3d 1423, 1428 (1997) (citation omitted); *Mita Copystar*, ___ Fed. Cir. (T) at ___, 21 F.3d at 1082 (citation omitted). More importantly, it is also well established that an Explanatory Note acts only as a guide when the term at issue is specifically included or excluded from the Note. *See, e.g., H.I.M./Fathom, Inc. v. United States*, 21 CIT ___, ___, 981 F. Supp. 610, 613 (1997) ("[T]he Explanatory Notes are persuasive authority for the Court when they specifically include or exclude an item from a tariff heading.") (citation omitted). This is not the case here; the ambiguity as to whether the Note includes or excludes the laser treatment is apparent. Consequently, no guidance is derived from this source.

A.

Defendant defines "further worked" in the context of HTSUS subheading 7607.11.30 as the "mechanical deformation of a product in the solid state after the fabrication of the original product." *Def.'s Pre-Trial Mem.*, at 11. *See also Depo. Test. of Dr. McNallan* (May 20, 1997) *("McNallan Depo.")*, at 77; Trial Test. of Dr. McNallan. Defendant maintains this is the metallurgical, or more precisely stated, the commercial meaning of the term "further worked."[2] On the other hand, *Webster's Ninth New Collegiate Dictionary* defines "further" and "worked" as:

> **further** * * *1. Farther * * * 2. in addition: Moreover 3. to a greater degree or extent * * *.
>
> **worked** * * * that has been subjected to some process of development, treatment, or manufacture.

Webster's Ninth New Collegiate Dictionary 500, 1359 (1983). Thus, the dictionary meaning for the term "further worked" amounts to the following: to subject an existing product to some process of development, treatment, or manufacture to a greater degree or extent. There is a plain conflict between the dictionary and purported commercial meaning of the term.

As discussed earlier, when the common and commercial meaning of a term differ, the party advocating the commercial meaning has the burden of proving its definition is "definite, uniform, and general throughout the trade." *See Rohm & Haas, supra*. Thus, the defendant must prove that for purposes of HTSUS subheading 7607.11.30, the Court should adopt the metallurgical or commercial meaning of the term that it favors.

Defendant fails to meet its burden. The government's expert witness,[3] Dr. McNallan, testified on direct that the government's favored

[2] Although far from clear, it appears that defendant would like the Court simply to view its proposed definition as any other technical or scientific reference, references that are often used to assist the court in ascertaining the "common" meaning of a term. *See, e.g., Brookside Veneers*, 6 Fed. Cir. (T) at 125–26, 847 F.2d at 789–90. In fact, however, defendant asks much more of the Court. Defendant urges the Court to adopt a meaning of the term "further worked" that it describes in various places as the "ordinary commercial, metallurgical understanding"; "the meaning [] the term * * * has with respect to metals in general, and aluminum, in particular"; and the meaning of the term in the "metallurgical sense as it is understood in the aluminum industry." *Def.'s Reply Pre-Trial Mem.*, at 6; *Id.* at 3; *Def.'s Pre-Trial Mem.*, at 11, 15.

The Court cannot blind itself to the fact that defendant seeks application of a definition that can only be described as the commercial designation of that term. The "commercial designation" of a term refers to the interpretation commonly placed upon it by the particular industry. *See S.G.B. Steel*, 82 Cust. Ct. at 204–05. Without doubt, defendant here asks the Court to adopt the "commercial designation" of the term "further worked."

[3] Winter-Wolff objected to Dr. McNallan's certification as an expert on the effect(s) of the laser treatment. Dr. McNallan is a Professor of Materials Sciences at the University of Illinois at Chicago; has served on the faculty of the Metallurgical program there since 1978; earned his Ph.D. in Metallurgy from MIT in 1977; and has taught and supervised research on many aspects of metallurgy and materials processing technology. Under FRE R. 702 a witness qualified by "knowledge, skill, experience, training, or education" will be allowed to testify as an expert if the testimony "will assist the trier of fact * * *." This court has recognized in the past that when dealing with metallurgical provisions, the testimony of metallurgists may be particularly helpful. *See W.R. Filbin & Co. v. United States*, 63 Cust. Ct. 200, 205–04, 306 F. Supp. 440, 443–44 (1969).

Here, Dr. McNallan plainly has expertise in the fields of metallurgy and materials processing. The testimony of Dr. McNallan, while perhaps founded on expertise more general than the topics at issue in this trial, helped to illuminate the meaning of the term "further working" in a metallurgical context. For this reason, the Court allowed Dr. McNallan to testify as an expert in this trial. Winter-Wolff's objections went to the ultimate questions in this case; that is, the objections went to the weight that should be accorded Dr. McNallan's testimony, not to the admissibility of the testimony. *See Sylla-Sawdon v. Uniroyal Goodrich Tire Co.*, 47 F.3d 277, 283 (8th Cir. 1995) ("[C]hallenges to the expert's skill or knowledge go to the weight to be accorded to the expert testimony rather than to its admissibility.") (internal quotations and citations omitted).

definition is widely accepted in the metallurgical field. The evidence belies this claim. For example, Dr. McNallan noted at trial that he regards the technical sources cited in the government's pre-trial memorandum as authoritative in the metallurgical field and in the aluminum foil industry. These sources included the following: (1) *Rolling Aluminum: From the Mine Through the Mill*, The Aluminum Ass'n., 1990; (2) *Aluminum Properties and Physical Metallurgy*, American Soc'y for Metals (John Hatch ed., 1984); (3) J Temple Black & Ronald A. Kosher, *Materials and Processes in Manufacturing*, (6th ed. 1984); (4) G. Sachs, *Fundamentals of the Working of Metals* (1954); (5) Joe Lawrence Morris, *Modern Manufacturing Processes* (1955); and (6) Norman E. Dowling, *Mechanical Behavior of Materials* (1993). Significantly, not one of the six sources cited by the government as support, and qualified by Dr. McNallan as authoritative, even hints that the definition of "work" is limited solely to deformation of the "*mechanical*" variety. For instance, the glossary to *Rolling Aluminum* defines "work" as follows: "[i]n metallurgy, to deform metal sufficiently to alter its metallurgical structure, and consequently its mechanical properties." *Id.* at Glossary, 9–5. Similarly, *Materials and Processes in Manufacturing* defines hot and cold working, in part, as the "plastic deformation of metals * * *." *Id.* § 13, at 331, 334. As with the other references cited by the government, neither source incorporates the qualifier "mechanical" to describe the deformation that must occur to be considered "worked" in either the metallurgical field or the aluminum foil industry. Also, further refinement of the definition through the addition of "in the solid state" is wholly lacking from the cited metallurgical and aluminum industry technical sources. The contradictions with authoritative sources from the metallurgical field and the aluminum foil industry alone suffice to show that defendant's proposed commercial definition is far from uniform or definite (either in the metallurgical field, in general, or the aluminum foil industry, in particular).

Moreover, the definition offered by defendant and Dr. McNallan conflicts with the term "further worked" as described in other portions of the tariff schedule. For instance, Additional U.S. Note 2 to Chapter 72 of the HTSUS classifies the following processes as "further worked":

> [A]ny of the following surface treatments: polishing and burnishing; artificial oxidization; chemical surface treatments such as phosphatizing, oxalating and borating; coating with metal; coating with nonmetallic substances (e.g., enameling, varnishing, lacquering, painting, coating with plastic materials); or cladding.

Additional U.S. Note 2 to Chapter 72. On cross-examination and in his deposition testimony, Dr. McNallan conceded that most of these processes fail to satisfy his definition of the term "further worked." *See McNallan Depo.*, at 76–80; Trial Test. of Dr. McNallan. The Court is aware that Congress has expressly stated the terms of the Note apply only for purposes of Chapter 72, the iron and steel chapter of the tariff schedule. *See* Additional U.S. Note 2 to Chapter 72. Yet, the Court finds

instructive Dr. McNallan's outright rejection of the definition Congress supplied for "further worked," albeit one supplied in the context of another metallurgical provision. The conflict between Dr. McNallan's testimony and the language in Note 2 obviously is not dispositive of whether the government's definition should be used for purposes of subheading 7607.11. Nevertheless, it diminishes the weight that the Court might otherwise assign to Dr. McNallan's testimony in determining if the government's definition actually represents a definite, uniform commercial meaning of the term.

Finally, the purported commercial nature of the government's definition is further undermined by Dr. McNallan's own testimony. It is true that the Court certified Dr. McNallan as an expert, and it is evident that Dr. McNallan is well qualified in the field of metallurgy in general. On cross-examination, however, Dr. McNallan testified that he does not consider himself an expert in the field of aluminum foil manufacturing or in capacitor manufacturing. Nor has Dr. McNallan published an article, taught a course, or consulted on aluminum foil production, capacitor production, or the use of lasers in capacitor foil production. For these reasons, the Court declines to give substantial weight to Dr. McNallan's testimony as to what might be the uniform, definite commercial meaning for the term "further working" in the aluminum capacitor foil industry.

As aptly described in *Bar Zel Expediters, Inc. v. United States*, 3 CIT 84, 544 F. Supp. 868 (1982), *aff'd*, 1 Fed. Cir. (T) 17, 698 F.2d 1210 (1983), "it is not sufficient merely to show that the merchandise does not fall within an undefined commercial meaning different from the common meaning." 3 CIT at 89, 544 F. Supp. at 872 (citations omitted). In *Bar Zel*, the party advocating the commercial meaning introduced witnesses at trial who testified that the merchandise at issue was not known as "clasps" or "sew-on fasteners" in the commercial sense. Yet, the *Bar Zel* court correctly pointed out that while this testimony could be true, it missed the mark. According to the *Bar Zel* court, the evidence of record was insufficient to establish that a commercial designation for "clasps" or "sew-on fasteners" existed that was definite and uniform throughout the trade. 3 CIT at 89–90, 544 F. Supp at 872–73. Similarly here, defendant's evidence purports to show that the laser-treated foil is not "further worked" within the meaning of the commercial definition it advocates. Yet, the thrust of this evidence also misses its mark. Most importantly, defendant's evidence is inconclusive as to whether the commercial meaning of the term it advocates is definite and uniform throughout the metallurgical field, in general, and the aluminum foil industry, in particular.

It is fundamental that a commercial designation cannot be established where there is a conflict as to its meaning. *See, e.g., S.G.B. Steel*, 82 Cust. Ct. at 209 (citations omitted). When viewed against authoritative sources and other references, defendant's and Dr. McNallan's definition is replete with contradictions and plainly lacks uniformity. With

acute clarity, the record evidence demonstrates that defendant failed to establish that there is a definite and uniform commercial definition that can be ascribed to the term "further worked." The Court, therefore, is unpersuaded that the commercial designation advanced by defendant represents the appropriate meaning of the term "further worked" for purposes of HTSUS subheading 7607.11.

B.

In the absence of a special commercial designation, the language of a tariff term is to be construed in accordance with its common, dictionary meaning. *See, e.g., Central Prod. Co., supra.* As noted earlier, the definitions of "further" and "worked" in *Webster's Ninth New Collegiate Dictionary* amount to the following: to subject an existing product to some process of development, treatment, or manufacture to a greater degree or extent. Similarly, the *Oxford English Dictionary* defines "further" and "work" as follows:

> **further** [ ], *adv.*, * * *1. To or at a more advanced point of progress: * * * 2. To a greater extent; more.
>
> **work** * * * 3. To produce by (or as by) labour or exertion; to make, construct, manufacture; to form, fashion, shape.

6 *Oxford English Dictionary* 285 (2d ed. 1989); 20 *Oxford English Dictionary* at 541.

When cobbled together, this dictionary meaning amounts to the following: to form, fashion, or shape an existing product to a greater extent. At first blush the melded dictionary meanings may appear too general for purposes of assigning meaning to a tariff term. However, after considering the other technical sources and the record evidence discussed below, the Court is convinced the term "further worked" for purposes of HTSUS subheading 7607.11 should be defined in accordance with its dictionary meaning. Of course, the Court still must determine whether the laser treatment constitutes "further working" in accordance with its common, dictionary meaning.

The Court is satisfied that it does. First, evidence adduced at trial demonstrates that the laser treatment is performed on merchandise that already exists as a commercial product and, hence, the process constitutes "further" working. Specifically, Mr. Sprunger testified at trial that a commercial product exists after the aluminum foil is hard slit and before it is placed in inventory. As support, Mr. Sprunger testified that the hard-slit foil is slit to the gauge and width required by customers, and he testified that a major customer in the United States purchases the hard-slit foil. Importantly, Dr. McNallan, on cross-examination, also confirmed that a commercial product exists after the foil has been hard slit and before it has been placed in inventory. In addition, testimony from various witnesses at trial, including Mr. Sprunger and Mr. Fletcher, demonstrated that the laser treatment added substantial value to the existing commercial product, indeed somewhere between 20% and 30%, a fact that leads the Court to believe some "further" pro-

cess indeed occurred. Finally, Dr. McNallan conceded that even in his view the laser treatment amounted to "*further* processing," as distinguished from "further working." For the above reasons, the Court finds that the laser treatment constitutes at least a "further" process within the dictionary meaning of the term.

Significantly too, the evidence of record demonstrates that the laser treatment constitutes "working" within the common meaning of that term. Mr. Sprunger testified that the purpose of the laser treatment is to improve the edge of the foil and, in doing so, to offer capacitor manufacturers a better product. The laser-slit foil is deemed improved because the laser effectively rounds an edge of the aluminum capacitor foil. *See* Pl.'s Ex. 6 (This exhibit, accepted into evidence at trial, dramatically illustrates the differences between the edges of the product that has been subjected to the laser treatment and the edges of foil that have been slit by knives.). According to plaintiff's witnesses, Mr. Sprunger and Mr. Fletcher, this effect is important because the edges of standard capacitor foil have "burrs" caused by the knife-slitting process. As Mr. Fletcher testified, the burrs are anathema to capacitor manufacturers because they adversely affect DIV performance and, in turn, increase the likelihood that dielectric breakdown may occur in the capacitor. The rounded edges, on the other hand, enhance DIV performance and, thus, are preferred by capacitor manufacturers and, ultimately, electrical utilities. *See* Pl.'s Ex. 5 (This exhibit, accepted into evidence at trial, is a brochure from Cooper explaining the benefits for electrical utilities that result from the rounded, laser-treated edges). Importantly, Mr. Sprunger testified that, to his knowledge, Neher is the only capacitor foil manufacturer that employs the laser treatment. Mr. Sprunger also testified that the enhanced value of the laser-treated product is evidenced by the customers' willingness to pay "substantially more" for the laser-treated product—a fact supported by Mr. Fletcher's testimony that Cooper is willing to pay 20% to 30% more to obtain the laser-treated foil. Also, the record evidence established that the only method to achieve the rounded edge deemed so valuable by the capacitor manufacturer and, in turn, the electrical utility companies, is through the laser process. *See* Trial Test. of Mr. Sprunger.

Furthermore, on cross-examination, Dr. McNallan even testified that the laser treatment "deformed" the edge of the foil. Referring back to the authoritative metallurgical and aluminum industry sources cited by the government, it is apparent that "deformation" is a critical component of "working." For example, *Rolling Aluminum* defines "work" as "to deform metal sufficiently to alter its metallurgical structure * * *." *Id.* at Glossary, 9–5. Similarly, in describing the process of "working," *Aluminum Properties and Physical Metallurgy* states "[t]he deformation of aluminum and its alloys proceeds by normal crystallographic slip processes." *Id.* § 4, at 105. Since the Court finds reference to the technical sources instructive, Dr. McNallan's admission that the laser "deforms" the edge leads the Court to believe that the treatment at issue

constitutes "working" even when measured against technical references. From this review, the Court is convinced that the physical effects[4] produced by the laser amount to a process, treatment, or development. Hence, the laser treatment constitutes "working" within the common, dictionary meaning of the term.

Therefore, the Court finds that the laser treatment constitutes both a "working" and a "further" working within the common, dictionary meaning of these terms. For this reason, the Court holds that Customs incorrectly classified the imported merchandise under HTSUS subheading 7606.11.30, as aluminum capacitor foil, *not further worked*.

As discussed previously, the Court has found that the metallurgical, commercial meaning of the term "further worked" as proposed by defendant is not uniform and, hence, inapplicable for classification purposes. The Court nevertheless notes that even were it to adopt this more restrictive definition, it would still find that the laser treatment meets the rigors of the government's definition. Specifically, Dr. McNallan testified that the knife slitting would constitute "further" processing as well as "further working" within the meaning of the definition espoused by defendant because mechanical deformation occurs at the edge of the foil. Dr. McNallan then testified that the laser treatment amounted to further processing, and that the laser even deformed the edge of the foil. Yet, in his view it did not constitute further working solely because there was no *mechanical* deformation involved.

This view is contradicted by the facts of the case. The laser treatment simply constitutes a more advanced, refined method of "mechanical" slitting. Indeed, there are mechanical components to the laser treatment. Most notably, the foil is mechanically pulled under the laser, and the edge that is not subjected to the laser treatment is simultaneously sheared mechanically by knives. Also, the notion that a laser performs a non-mechanical function while a knife performs a mechanical function, is nonsensical and purely semantic. In the Court's view, this evidence would also be sufficient to conclude that actual *mechanical* deformation occurs as a result of the laser treatment. Hence, the treatment would constitute "further working" even within the strictures of the government's purported commercial definition.

C.

Finally, the government maintains that if the Court finds that Customs' erred in classifying the merchandise as "not further worked," the foil is still "cut-to-shape" by the laser such that the merchandise should be classified under HTSUS subheading 7607.19.30 (dutiable at 5.7% *ad*

[4] At trial, much ado was made about whether the laser treatment also caused an increase in the oxide layer on the foil and, thus, imparted an additional effect. To the Court, this was much ado about nothing. Apparently, an enhanced oxide layer might be beneficial for capacitor manufacturers because it acts as an "insulator." Mr. Sprunger, Mr. Fletcher, and Dr. McNallan all testified that an added oxide layer is, or likely is, produced by the laser treatment. Though not taken for the truth of the matter, the patent for the laser treatment also notes that an enhanced oxide layer forms on the surface of the foil. *See* Pl.'s Ex. 4 (U.S. Patent No. 4,916,285). Yet, defendant correctly pointed out at trial that there is no documentary evidence of this supposed effect. The Court need not resolve this factual dispute to reach a decision. The rounded edges and deformation that ensues from the laser treatment suffice to convince the Court that the treatment constitutes "working."

valorem) rather than under subheading 7607.19.60 (dutiable at 3% *ad valorem*). Specifically, the government contends the laser rounds the edges of the capacitor foil such that it must be considered foil that has been "cut-to-shape." ***See Def.'s Pre-Trial Mem.***, at 26.

The Court finds this argument without merit. At trial, plaintiff introduced samples of "die-cuts" for yogurt tops as examples of "cut-to-shape" foil. *See* Pl.'s Ex. 18. Defendant argued that because the samples surely could not be exhaustive of all types of cut-to-shape foil, they should be disregarded. The Court agrees in part. It is true that the samples may not be exhaustive of all types of cut-to-shape foil. Nevertheless, the samples still dramatically demonstrate that the imported merchandise has not been cut to shape. More concretely, the laser-treated foil is imported in rolls over three miles long. *See* Trial Test. of Mr. Fletcher. Also, Mr. Fletcher testified that Cooper, the capacitor manufacturer, cuts the foil over 150 times after receiving the merchandise. The laser-treated foil is markedly different, indeed not remotely similar, to the "die-cuts" that have plainly been cut to shape. It would be an absurd result if the Court were to find that merchandise imported in rolls over three-miles long and then cut upwards of one hundred times is "cut-to-shape" prior to importation. If the Court were to accept this result, effectively all capacitor foil that has been slit then might be considered "cut-to-shape." The statute, as evidenced by the subheadings to Chapter 76 of the HTSUS, plainly illustrates this is not an outcome contemplated by Congress.

Therefore, the Court finds that HTSUS subheading 7607.19.30 does not present an acceptable alternative classification for the imported merchandise at issue.

V.

CONCLUSION

For the foregoing reasons, the Court finds that Customs incorrectly classified the merchandise under HTSUS subheading 7607.11.30, rather than under subheading 7607.19.60 with a dutiable value of 3% *ad valorem*. Customs' classification decision is reversed and judgment will be entered accordingly.

(Slip Op. 98–16)

BAXTER HEALTHCARE CORP. OF PUERTO RICO, PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 95–05–00637

Plaintiff moves for summary judgment pursuant to U.S. CIT R. 56 challenging the United States Customs Service's ("Customs") classification of the merchandise at issue under subheading 5404.10.8080 of the Harmonized Tariff Schedule of the United States ("HTSUS"), at a duty rate of 7.8% *ad valorem* as a "synthetic monofilament of 67 decitex or more and of which no cross-sectional dimension exceeds 1 mm". Plaintiff argues the merchandise at issue is neither synthetic nor a monofilament, but is properly classified in subheading 9019.20.0000, HTSUS, as part of an "artificial respiration apparatus" because it is a part of plaintiff's UNIVOX blood oxygenator. Alternatively, plaintiff argues blood oxygenators and their parts are classified properly in subheading 9018.90.7080, HTSUS, as part of an "electro-medical apparatus." Plaintiff requests this Court order Customs to reliquidate plaintiff's entries of OXYPHAN capillary membrane under subheading 9019.20.0000, HTSUS, dutiable at 4.2% *ad valorem*, or alternatively under subheading 9018.90.7080, HTSUS, dutiable at 3.8% *ad valorem*, and refund all excess duties with interest as provided by law.

Plaintiff also moves for oral argument on its Motion for Summary Judgment and defendant's Cross-Motion for Summary Judgment, contending oral argument on the issues raised in the pending motions will aid the Court in reaching its decision.

Defendant cross moves for summary judgment, requesting this Court deny plaintiff's motion and dismiss this action. Defendant argues the merchandise at issue falls within the definition of a synthetic monofilament set forth in the HTSUS, the Explanatory Notes and all lexicographic sources. Alternatively, defendant argues even if the merchandise at issue were classifiable as part of an oxygenator, it is not classifiable as an artificial respiration apparatus, nor as part of an electro-medical apparatus, but rather as an "electro-surgical apparatus" under subheading 9018.90.60, HTSUS, dutiable at 7.9% *ad valorem*.

Held: Plaintiff's Motion for Summary Judgment is denied and defendant's Cross-Motion for Summary Judgment is granted. Plaintiff's Motion for Oral Argument is denied.

(Dated February 24, 1998)

Katten Muchin & Zavis (Mark S. Zolno, Michael E. Roll), New York, NY, for plaintiff.

Frank W. Hunger, Assistant Attorney General of the United States; *Joseph I. Liebman,* Attorney-in-Charge, International Trade Office, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Barbara Silver Williams), Sheryl A. French,* Office of Assistant Chief Counsel, United States Customs Service, Of Counsel, for defendant.

OPINION

CARMAN, *Chief Judge:* This case is before this Court on cross-motions for summary judgment pursuant to U.S. CIT R. 56. Plaintiff, Baxter Healthcare Corporation of Puerto Rico ("Baxter"), challenges the United States Customs Service's ("Customs") classification of the merchandise at issue under subheading 5404.10.8080 of the Harmonized Tariff Schedule of the United States ("HTSUS")[1], at a duty rate of 7.8% *ad valorem* as a "synthetic monofilament of 67 decitex or more and of which no cross-sectional dimension exceeds 1 mm". Plaintiff argues the merchandise at issue is neither synthetic nor a monofilament, but is

[1] The HTSUS provisions cited by the Court appear in HTSUS (2nd ed. 1990).

classified properly in subheading 9019.20.0000, HTSUS, as part of an "artificial respiration apparatus" because it is a part of plaintiff's UNIVOX blood oxygenator. Alternatively, plaintiff argues blood oxygenators and their parts are classified properly in subheading 9018.90.7080, HTSUS, as part of an "electro-medical apparatus". Plaintiff requests this Court order Customs to reliquidate plaintiff's entries under subheading 9019.20.0000, HTSUS, dutiable at 4.2% *ad valorem*, or alternatively under subheading 9018.90.7080, HTSUS, dutiable at 3.8% *ad valorem*, and refund all excess duties with interest as provided by law. Plaintiff also moves for oral argument on its Motion for Summary Judgment and defendant's Cross-Motion for Summary Judgment, contending oral argument on the issues raised in the pending motions will aid the Court in reaching its decision.

Defendant cross moves for summary judgment, requesting this Court deny plaintiff's motion and dismiss this action. Defendant argues the merchandise at issue falls within the definition of a synthetic monofilament set forth in the HTSUS, the Explanatory Notes and all lexicographic sources. Alternatively, defendant argues even if the merchandise at issue were classifiable as a part of an oxygenator, it is not classifiable as an artificial respiration apparatus, nor as part of an electro-medical apparatus, but rather as an "electro-surgical apparatus" under subheading 9018.90.60, HTSUS, dutiable at a rate of 7.9% *ad valorem*.

This Court has jurisdiction under 28 U.S.C. § 1581(a) (1988) and this action is before the Court for *de novo* review under 28 U.S.C. § 2640(a)(1) (1988). For the reasons which follow, this Court denies plaintiff's Motion for Summary Judgment and grants defendant's Cross-Motion for Summary Judgment. The Court denies plaintiff's Motion for Oral Argument.

BACKGROUND

A. *Subject Merchandise:*

Plaintiff, the importer of the merchandise at issue in this case, described the merchandise on its commercial invoices as the "Oxyphan (R) Capillary Membrane for Oxygenation." (Pl.'s Stmt of Mater. Facts at 1.) The trademarked name of the merchandise sold to plaintiff is OXYPHAN. Plaintiff imports the merchandise at issue from Germany and purchases the OXYPHAN capillary membrane from Akzo Nobel Faser AG.

The merchandise at issue is produced using a thermally induced phase separation process. During this process, a polymer (polypropylene) is melted and mixed with two natural seed oils (soy and castor oil), and the mixture is extruded through a spinneret. During the cooling phase, the oils are separated and removed from the polymer, creating pores in the membrane. Once the cooling phase is complete, the membrane is dried and wound on spools. Baxter purchased the merchandise on spools that contained approximately ten kilometers of finished membrane. The merchandise at issue was always sold to Baxter by the length

of the capillary membrane contained on a spool (in kilometers) and never by decitex.[2] The membrane was not subject to a drawing process[3] during manufacture. Baxter used the merchandise at issue solely in the production of its UNIVOX oxygenators, which are utilized almost exclusively to oxygenate blood in connection with surgical procedures.

The merchandise at issue was liquidated by Customs under subheading 5404.10.8080, HTSUS, at a duty rate of 7.8% *ad valorem* as "synthetic monofilament of 67 decitex or more and of which no cross-sectional dimension exceeds 1 mm".

Plaintiff protested Customs' classification of the merchandise within the time provided by law. Customs subsequently denied plaintiff's protest on December 3, 1991, in Headquarters Ruling ("HQ") 950047. In HQ 950047, Customs concluded "[a]ll the specifications of the subject merchandise meet the prerequisites of Heading 5404, HTSUS[], and classification is therefore proper within this provision of the Nomenclature." HQ 950047 (December 3, 1991). After having paid all liquidated duties, plaintiff timely commenced this action.

B. *Statutory Provisions at Issue:*

The parties rely on the following provisions of the HTSUS:

(1) Plaintiff's Proposed Subheading:

9019	Mechano-therapy appliances; massage apparatus; psychological aptitude-testing apparatus; ozone therapy, oxygen therapy, aerosol therapy, *artificial respiration or other therapeutic respiration apparatus*; parts and accessories thereof:	
* * * * * * *		
9019.20.000	Ozone therapy, oxygen therapy, aerosol therapy, artificial respiration or other therapeutic respiration apparatus; and accessories thereof	3.7%

(emphasis added).

(2) Plaintiff's Alternative Subheading

9018	Instruments and appliances used in medical, surgical, dental or veterinary sciences, including scintigraphic apparatus, *other electro-medical apparatus* and sight-testing instruments; parts and accessories thereof:	
* * * * * * *		
9018.90	Other instruments and appliances and parts and accessories thereof:	

---

[2] The coarseness of a yarn or filament is usually gauged as "denier". The denier was the unit used in the real-silk industry long before man-made fibers were invented. Another unit which is sometimes used instead of the denier is the tex, which is defined as the weight in grams of 1,000 meters. Another way to look at it is that the tex of a yarn or filament is its weight in milligrams per meter. Sometimes the term decitex or dtex is encountered; its relation to the others is:

0.1 tex = 1 d(eci)tex = 100 millitex = 0.9 denier.

The tex is a universal unit, used for all fibers. *See* R.W. Moncrieff, *Man-Made Fibres* 5, 7–8 (5th ed. 1970).

[3] Drawing is defined as "[t]he forming of a sheet of thermoplastic material in which the material is stretched and its thickness reduced." Jeffrey R. Stewart, assisted by Frances E. Spicer, *An Encyclopedia of the Chemical Process Industries* 241 (1956).

* * * * * * *

9018.90.70 Other:

* * * * * * *

9018.90.7080 Electro-medical instruments and appliances and parts and accessories thereof:

* * * * * * *

Other

* * * * * * *

Other 4.2%

(emphasis added).

(3) Subheading Used by Customs in Classifying and Liquidating the Merchandise at Issue

5404 *Synthetic monofilament* of 67 decitex or more and of which no cross-sectional dimension exceeds 1 mm; strip and the like (for example, artificial straw) of synthetic textile materials of an apparent width not exceeding 5 mm:

5404.10 Monofilament:

* * * * * * *

Other:

* * * * * * *

Other 7.8%

(emphasis added).

(4) Defendant's Proposed Alternative Subheading

9018.90.60 Electro-surgical instruments and appliances, other than extracorporeal shock wave litho-tripters; all the foregoing and parts and accessories thereof 7.9%

CONTENTIONS OF THE PARTIES

Plaintiff argues Customs erred in classifying the merchandise at issue as a synthetic monofilament in subheading 5404.10.8080, HTSUS, "because the OXYPHAN® capillary membrane does not meet the definition of a 'synthetic monofilament.' It is neither synthetic, nor is it a 'monofilament.'" (Pl.'s Mem. in Supp. of Mot. for Summ. J. ("Pl.'s Br.") at 7–8.) Plaintiff argues the merchandise is a part of a blood oxygenator which is classified properly as an "artificial respiration apparatus" in subheading 9019.20.0000, HTSUS, or alternatively, as an "eletro-medical apparatus" in subheading 9018.90.7080, HTSUS. Based on these arguments, plaintiff requests this Court order Customs to reliquidate the entries of the merchandise at issue under subheading 9019.20.0000, HTSUS, dutiable at 4.2% *ad valorem*, with interest as provided for by law, or alternatively under subheading 9018.90.7080, HTSUS, dutiable at 3.8% *ad valorem*, with interest as provided for by law.

Defendant argues the merchandise at issue fits the definition of a synthetic monofilament set forth in the HTSUS, the Explanatory Notes

and all lexicographic sources and thus was properly classified under subheading 5404.10.8080, HTSUS, as a "synthetic monofilament of 67 decitex or more and of which no cross-sectional dimension exceeds 1 mm". Defendant maintains that according to the HTSUS, Explanatory Notes, and lexicographic authorities, the merchandise at issue is not part of another article but "is simply a material." (Def.'s Mem. in Supp. of Def.'s Cross-Mot. for Summ. J. and in Opp'n to Pl.'s Mot. for Summ. J. ("Def.'s Br.") at 5.) Defendant further argues even if the merchandise at issue were classifiable as part of an oxygenator, it is not classifiable under subheading 9019, HTSUS, as an artificial respiration apparatus because "[t]he imported monofilament does not perform the same functions as articles *ejusdem generis* with artificial respiration apparatus." *(Id.)* Defendant additionally contends because the imported monofilament meets the description for electro-surgical apparatus, "it would not be classified[, as plaintiff contends,] in the basket provision for electro-medical apparatus, heading 9018.90.70", but would rather "be classifiable as an electro-surgical apparatus, under subheading 9018.90.60, HTSUS." *(Id.)*

Standard of Review

In a case involving factual disputes between the parties, the government's classification decision is presumed to be correct, *see* 28 U.S.C. § 2639 (a)(1) (1988), and the party challenging the decision has the burden of overcoming the statutory presumption by a preponderance of the evidence. *See St. Paul Fire & Marine Ins. Co. v. United States*, 6 F.3d 763, 769 (Fed. Cir. 1993). Where, as here, there are no material facts in dispute and only questions of law remain, the statutory presumption of correctness under § 2639 is irrelevant, and the Court has a statutory duty to decide the meaning of a classification term. *See* 28 U.S.C. § 2640(a)(1) (1988). No deference attaches to Customs' classification decisions where there are no disputed issues of material fact.

In *Rollerblade, Inc. v. United States*, 112 F.3d 481 (Fed. Cir. 1997), the Court of Appeals for the Federal Circuit ("Federal Circuit") held the Court of International Trade's ("CIT") duty "to reach the correct decision" in classification cases would be subverted if Customs' interpretation of a classification term was given deference. *Rollerblade, Inc.,* 112 F.3d at 484; *see also Universal Electronics v. United States*, 112 F.3d 488, 491–93 (Fed. Cir. 1997). As a result, if the Court finds, because of evidence or other authority presented by plaintiff, that Customs' classification decision is incorrect, this Court must reach the correct classification on its own or after remand to the agency. *See e.g., Jarvis Clark Co. v. United States*, 2 Fed. Cir. (T) 70, 74–75, 733 F.2d 873, 878 ("[T]he court's duty is to find the *correct* result, by whatever procedure is best suited to the case at hand"), *petition for reh'g denied*, 2 Fed. Cir. (T) 97, 739 F.2d 628 (1984).

DISCUSSION

A. *Summary Judgment:*

This case is before the Court on cross-motions for summary judgment pursuant to U.S. CIT R. 56. Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." U.S. CIT R. 56(d). "The Court will deny summary judgment if the parties present 'a dispute about a fact such that a reasonable trier of fact could return a verdict against the movant.'" *Ugg Int'l., Inc. v. United States*, 17 CIT 79, 83, 813 F. Supp. 848, 852 (1993) (citation omitted). Both parties in this case agree, and the Court finds, there are no genuine issues of material fact which would prevent this Court from deciding this action on the basis of the pending motions for summary judgment. (*See* Pl.'s Br. at 7; Def.'s Br. at 6.) Therefore, the sole issue remaining before the Court is under which tariff heading the merchandise at issue properly is classified.

B. *Whether the Merchandise at Issue is a Synthetic Monofilament:*

(1). Whether Oxyphan is Synthetic

Baxter's primary argument is that the merchandise at issue was classified incorrectly as a "synthetic monofilament" because it is not synthetic and because it is not a monofilament. Defendant argues Baxter is incorrect on both grounds.

In addressing the definition of a synthetic fiber, plaintiff argues a synthetic fiber is one that is produced by the polymerization of organic monomers. Plaintiff maintains

> [t]he OXYPHAN® capillary membrane cannot be classified as a "synthetic" monofilament in HTSUS subheading 5404 because it does not meet the definition of synthetic. When an article is "more than" the article described by [a] (sic) tariff provision, it cannot be classified in that provision. In this case, the OXYPHAN® capillary membrane is manufactured by mixing a polymer with soy and castor oils. The manufacturing process consists of "more than" [the] (sic) polymerization [of] (sic) organic monomers. Accordingly, the imported OXYPHAN® capillary membrane is not "synthetic."

(Pl.'s Br. at 9 (citations omitted).)

Defendant, however, argues the above-quoted definitions mean "synthetic 'manmade' fibers are filaments of organic polymers produced by polymerization of organic monomers" and "as the General Explanatory Notes to Chapter 54, specifically list, polypropylene is a synthetic fiber." (Def.'s Br. at 10.) Defendant also contends "[b]ecause the subject material in its imported condition, is made entirely of polypropylene, a synthetic man-made monofilament, it is properly classified as a synthetic monofilament." (*Id.* at 10–11 (footnote omitted).) Defendant notes the rule that an article is classified according to its condition upon importation bolsters this argument. (*See id* at 10 n.2 (citing *Mitsubishi Int'l Corp. v. United States*, 78 Cust. Ct. 4, C.D. 4686 (1978)).)

Defendant further supports its argument by pointing out Baxter, in its response to question number 23 of Defendant's First Interrogatories and Request for Production of Documents, agreed the imported merchandise is synthetic by admitting that "the polypropylene used to manufacture Oxyphan is synthetic." (*Id.* at 11 (quoting Pl.'s Resp. to Def.'s 1st Interrog., in Def.'s App. Ex. 3 at 20).) In further responding to plaintiff's argument, defendant states "Baxter's contention is most obviously unmeritorious as the statute does not ever limit its definition of synthetic filaments to filaments produced *only* by polymerization of organic monomers, without any other incidental process or materials, which are subsequently removed." (*Id.* at 11.) Defendant additionally points out the General Explanatory Notes, in listing examples of synthetic fibers, describe polyurethane as resulting from the polymerization of polyfunctional isocyanates with polyhydroxl compounds, such as castor oil, and thus contemplated the inclusion of oils in the production of synthetic fibers. Finally, defendant points to General Rule of Interpretation ("GRI") 2(b) which provides:

> Any reference in a heading to a material or substance shall be taken to include a reference to mixtures or combinations of that material or substance with other materials or substances. Any reference to goods of a given material or substance shall be taken to include a reference to goods consisting wholly or partly of such material or substance. * * *

HTSUS, Gen. R. Interp. 2(b). Defendant concludes in accordance with GRI 2(b) and the General Explanatory Notes to Chapter 54, "synthetic filaments made with oil fall within the HTSUS definition of synthetic, and such fibers would be classified in Chapter 54." (Def.'s Br. at 12.)

Classification of merchandise under the HTSUS is performed in accordance with the General Rules of Interpretation, taken in order. GRI 1 states "classification shall be determined according to the terms of the headings and any relative section or chapter notes." HTSUS, Gen. R. Interp. 1. In the absence of a precise definition appearing in the HTSUS, the correct meaning of a term is usually resolved by ascertaining its common and commercial meaning. In construing such terms, "the court may rely upon its own understanding, dictionaries and other reliable sources." *Medline Indus., Inc. v. United States*, 62 F.3d 1407, 1409 (Fed. Cir. 1995) (*citing Marubeni Am. Corp. v. United States*, 35 F.3d 530 (Fed. Cir. 1994)).

The HTSUS definition for synthetic, as it applies to monofilaments in Chapter 54, HTSUS, is set forth in Note 1 of that Chapter and provides:

> 1. Throughout the tariff schedule, the term "*man-made fibers*" means staple fibers and filaments of organic polymers produced by manufacturing processes, either:
>
> (a) By polymerization of organic monomers, such as polyamides, polyesters, polyurethanes or polyvinyl derivatives; or
>
> (b) By chemical transformation of natural organic polymers (for example, cellulose, casein, proteins or algae), such as viscose rayon, cellulose acetate, cupro or alginates.

> The terms "*synthetic*" and "*artificial*", used in relation to fibers mean: synthetic: fibers as defined at (a); artficial: fibers as defined at (b).
>
> The terms "*man-made*", "*synthetic*" and "*artificial*" shall have the same meanings when used in relation to "*textile materials*".

HTSUS, Chapter 54, Note 1.

Additionally, the Harmonized Commodity Description and Coding System General Explanatory Notes[4] for Chapter 54, state with respect to synthetic fibers:

> The basic materials for the manufacture of these fibres are generally derived from coal or oil distillation products or from natural gas. The substances produced by polymerisation are either melted or dissolved in a suitable solvent and then extruded through spinnerets (jets) into air or into a suitable coagulating bath where they solidify on cooling or evaporation of the solvent, or they may be precipitated from their solution in the form of filaments.
>
> At this stage their properties are normally inadequate for direct use in subsequent textile processes, and they must then undergo a drawing process which orientates the molecules in the direction of the filament, thus considerably improving certain technical characteristics (e.g., strength).
>
> The main *synthetic fibers* are:
>
> * * * * * * *
>
> (3) *Polypropylene*: Fibres composed of acyclic saturated hydrocarbon linear macromolecules having in the macromolecular composition at least 85% by weight of units with every other carbon atom carrying a methyl side group in an isotactic position and without further substitution.
>
> * * * * * * *
>
> (7) *Polyurethane*: Fibres resulting from the polymerisation of polyfunctional isocynates with polyhydroxy compounds, such as castor oil, butane -1, 4-diol, polyether polyols, polyester polyols.

Harmonized Commodity Description and Coding System, Chapter 54, General Explanatory Note I (1986).

This Court finds Customs' decision the merchandise at issue is synthetic is correct. Plaintiff's argument that because the merchandise is manufactured by mixing a polymer with soy and castor oils, the manufacturing process consists of "more than" the polymerization of organic monomers does not demonstrate an error in Customs' classification of the merchandise as synthetic. Moreover, this Court finds defendant's argument the definition of synthetic fibers is not limited to

---

[4] The *Explanatory Notes* constitute the World Customs Organization's official interpretation of the HTSUS. While not legally binding on the parties, the Notes provide a commentary on the scope of each heading and interpretive rule of the HTSUS and are useful in ascertaining the classification of merchandise under the HTSUS. *See Lonza, Inc. v. United States*, 46 F. 3d 1098, 1109 (Fed. Cir. 1995) ("While the *Explanatory Notes* do not constitute controlling legislative history, they do offer guidance in interpreting HTS[US] subheadings."); *see also Rollerblade, Inc.*, 112 F.3d at 486 n.3 (although the Explanatory Notes are not controlling legislative history, "they are nonetheless intended to clarify the scope of HTSUS subheadings and to offer guidance in interpreting its subheadings"). The Customs Service itself asserted that the Explanatory Notes "should be consulted for guidance." HQ 954822 (December 22, 1994).

filaments produced only by the polymerization of organic monomers, without any other incidental process or materials which are subsequently removed, is supported by the HTSUS as well as by the General Explanatory Notes which, in listing examples of synthetic fibers, describe polyurethane as resulting from the polymerization of polyfunctional isocyanates with polyhydroxl compounds, such as castor oil, in the production of synthetic fibers.

Additionally, this Court notes the deposition testimony of Gregory P. Watson, an agent of the plaintiff:

> THE WITNESS: * * * As the material comes out of Akzo's spinneret, it is a combination of three terms: a polypropylene, which is a synthetic material, and two natural occurring oils. The natural occurring oils are later extracted from this material.
>
> Q. Right. So when it is imported into the United States, it is purely made of a synthetic material?
>
> A. It is purely made out of polypropylene.
>
> Q. And that is a synthetic material?
>
> A. Yes.

(Def.'s Br. Ex. 1 at 66–67.) The Court also notes plaintiff, in answer to Defendant's First Interrogatories and Request for Production of Documents, stated "[t]he polypropylene used to manufacture Oxyphan is synthetic." (Def.'s Br. Ex. 3 at 20.) As a result of the above, this Court finds Customs properly classified the merchandise at issue as synthetic. The Court next turns to plaintiff's argument the merchandise at issue is not a monofilament.

(2). Whether Oxyphan is a Monofilament

The HTSUS does not define the term "monofilament", and as stated above, in the absence of precise definitions in the HTSUS, the correct meaning of a term is usually resolved by ascertaining its common and commercial meaning. *See, e.g., Nestle Refrigerated Food Co. v. United States*, 18 CIT 661, 663 (1994) ("When a tariff term is not clearly defined in either the HTSUS or its legislative history, the correct meaning of a tariff term is generally resolved by ascertaining its common and commercial meaning."). In construing such terms, "the court may rely upon its own understanding, dictionaries and other reliable sources." *Medline Industries, Inc.*, 62 F.3d at 1409.

The General Explanatory Notes to heading 5404 help provide a definition of the term monofilament by stating:

> 5404.10 — *Monofilament*
> 5404.90 — *Other*
>
> This heading covers:
>
> * * * * * * *
>
> (1) *Synthetic monofilament*. These are filaments extruded as single filaments. They are classified here *only* if they measure 67 decitex or more and do not exceed 1 mm in any cross-sectional dimen-

sion. Monofilaments of this heading may be of any cross-sectional configuration and may be obtained not only by extrusion but by lamination or fusion.

* * * * * * *

All these products are generally in long lengths, but remain classified here even if cut into short lengths and whether or not put up for retail sale. They are used according to their different characteristics in the manufacture of brushes, sports rackets, fishing lines, surgical sutures, upholstery fabrics, belts, millinery, braids, etc.

This heading *does not include*:

(a) Sterile synthetic monofilament (*heading 30.06*).

(b) Synthetic monofilament of which any cross-sectional dimension exceeds 1 mm, or strip and flattened tubes (including strip and flattened tubes folded along the length), whether or not compressed or twisted (for example, artificial straw), *provided* that the apparent width (i.e., in the folded, flattened, compressed or twisted state) exceeds 5 mm (*Chapter 39*).

(c) Synthetic monofilament measuring less than 67 decitrex of *heading 54.02*.

(d) Strip and the like of *Chapter 56*.

(e) Synthetic monofilament, with hooks attached or otherwise made up into fishing lines (*heading 95.07*).

(f) Prepared knots and tufts for brush-making (*heading 96.03*).

Harmonized Commodity Description and Coding System, Explanatory Notes to Heading 54.04 (1986).

Plaintiff argues the merchandise at issue is not a monofilament for five reasons. First, plaintiff contends strength is an essential property of a monofilament and the merchandise at issue "does not have the tensile strength associated with monofilaments." (Pl.'s Br. at 9.) Plaintiff explains synthetic fibers and filaments are manufactured to obtain "strength higher than that of the materials from which they are made" and "the OXYPHAN® capillary membrane simply lacks the strength associated with a monofilament." (*Id.* at 9–10.)

Second, plaintiff argues the merchandise at issue is not a monofilament "because it does not undergo an essential process common to the production of monofilaments: drawing", where molecules are oriented through a mechanical stretching process in order to strengthen the filaments. (*Id.* at 10.) Plaintiff quotes the General Explanatory Notes' provision that synthetic fibers "'must undergo a drawing process which orients the molecules in the direction of the filament, thus considerably improving certain technical characteristics (*e.g.*, strength).'" (*Id.* at 10 (quoting General Explanatory Notes, Chapter 54).) Plaintiff concludes, "[n]ot only does the [merchandise at issue] not undergo a drawing or stretching process, [but] any stretching of the membrane would destroy its porosity and render it unsuitable for its intended use." (*Id.* at 11.)

Third, plaintiff maintains the merchandise at issue cannot be defined as a monofilament because it is 45% porous and "[n]o monofilament is

intentionally porous because porosity would weaken a monofilament." (*Id.*)

Fourth, plaintiff argues "the language of HTSUS heading 5404 bears no relevance to the capillary membrane. HTSUS heading 5404 covers monofilaments of 67 *decitex* or more. However, the term 'decitex' is not used in the sale of [the merchandise at issue]", but rather is a term used for measuring textile materials. (*Id.*) Plaintiffs further notes the merchandise at issue "is a medical, not a textile, product and is sold by length, not decitex." (*Id.*)

Finally, plaintiff argues "the high cost of the capillary membrane also distinguishes it from a textile product. Baxter pays at least 15 times more for [the merchandise at issue] than it pays for monofilaments that are also used in production of the UNIVOX®." (*Id.* at 12.) Plaintiff also relies upon the opinion of its expert, Dr. Lawrence Broutman, a research professor of materials engineering and the president of a private consulting company, who stated in his affidavit that "the OXYPHAN® capillary membrane is not a monofilament. Rather, it is a porous membrane made in the form of a capillary to facilitate its end use for high gas permeability." (Annex to Pl.'s Mot. for Summ. J. ("Pl.'s Annex") Ex. 1 at 4.)

In response to plaintiff's five reasons the merchandise at issue cannot be a monofilament, defendant responds "not only do [plaintiff's] declarations contradict Baxter's own explicit admissions made in deposition by the agent of the plaintiff, they contradict every lexicographic authority, and the declarants themselves failed to provide any lexicographic or other support for their positions." (Def.'s Br. at 13–14.) Defendant concludes "none of Baxter's proposed restrictions on the term monofilament exist in either the HTSUS, or the common meaning of the term monofilament." (*Id.* at 25.)

Defendant argues the General Explanatory Notes for HTSUS heading 5404 indicate that synthetic monofilaments are extruded as single filaments and may be of any cross-sectional configuration.[5] Defendant further contends the General Explanatory Notes to Section XI, the section in which heading 5404 falls, also offer guidance and state:

> (B) *Yarns*
>
> (1) *General*
>
> Textile yarns may be single, multiple (folded) or cabled. For the purposes of the Nomenclature:

---

[5] Defendant continues to explain in a footnote that under the predecessor statute, the Tariff Schedules of the United States ("TSUS") Schedule 3, Part 1 E, Headnote 3(b), the term monofilament was defined as:

> 3. * * *
>
> (b) the term "*monofilaments*" embraces single filaments (including single filaments of laminated construction or produced from two or more filaments fused or bonded together), whether solid or hollow, whether flat, oval, round, or of any other cross-sectional configuration, which are not over 0.06 inch in maximum cross-sectional dimension.

(Def.'s Br. at 15 n.4 (quoting TSUS, Schedule 3, Part 1(E), Note 3(b) (1985)).) Defendant argues "the TSUS defined monofilament as single filaments which were solid, hollow, flat, oval or any other cross-sectional configuration. The drafters of the HTSUS, therefore contemplated hollow and solid filaments as monofilaments when preparing the HTSUS." (*Id.*)

> (i) *Single yarns* means yarns composed *either of*:
>
> (a) staple fibres * * *; or of
> (b) One filament (*monofilament*) of headings 54.02 to 54.05, or two or more filaments (*multifilament*) of heading 54.02 or 54.03, held together, with or without twist (*continuous yarns*).

Harmonized Commodity Description and Coding System, Section XI, General Explanatory Note I(B) (1986). Defendant argues "[t]his General Explanatory Note indicates that the term monofilament, as used in Section XI, means one (single) filament" that is "generally created by extrusion with a constant cross-section." (Def.'s Br. at 16.)

Further, defendant argues "[t]he Explanatory Notes' interpretation of the meaning of the term monofilament is additionally consistent with and supported by the common meaning of the term as defined in lexicographic authorities." (*Id.* at 17.) Defendant cites several authorities, including *The McGraw Hill Dictionary of Scientific and Technical Terms*, *The Oxford English Dictionary*, *A Dictionary of Textile Terms*, *Fairchild's Dictionary of Textiles*, *Webster's Third New International Dictionary*, *The Randomhouse Dictionary of the English Language*, and *The 1991 Annual Book of ASTM Standards*, and argues the "common thread" in all the lexicographical definitions is

> as designated in the HTSUS, that a monofilament means one long filament or fiber whose cross-section is very small in relation to its length, and is often made through extrusion. * * * Not a single definition specifies that a monofilament, in order to be a monofilament, must not be porous, or must have undergone a drawing process, have any amount of tensile strength, be sold in terms of decitex, be used in a textile product, or be low cost.

(*Id.* at 19.)

Defendant additionally refutes the five reasons provided by plaintiff to support its argument the merchandise at issue cannot be a monofilament, describing them as "inaccurate and unsupportable." (Mem. in Reply to Pl.'s Opp'n to Def.'s Cross-Mot. for Summ. J. ("Def.'s Reply") at 2.) First, defendant argues no lexicographical authority supports plaintiff's theory that a certain tensile strength is required for monofilaments. Additionally, defendant contends "the very face of the HTSUS shows that tensile strength is not a quality relevant to the identity of a product as a monofilament. Rather, the HTSUS demonstrates that tenacity can only simply affect the subheading of monofilaments under which a particular monofilament is classified." (Def.'s Br. at 20.) Defendant concludes:

> Baxter's contention that its merchandise has no strength because the imported monofilament can be broken by pulling on its ends, is, in and of itself, wrong. The fact that it can be torn does not show it has *no* strength; it means only that most humans are stronger than it. In comparison to many other materials, such as certain threads, however, the imported monofilament is quite strong [and]

> (sic) has some tenacity. In fact, Baxter admits that the imported monofilament has [a] (sic) tenacity of 9.35 cN/tex.

(Def.'s Reply at 5 n.2 (citation omitted).)

Second, defendant maintains the HTSUS does not provide that every monofilament must, by definition, undergo drawing. Defendant argues, rather, the Explanatory Notes suggest the product is a filament when it emerges from the spinneret and "subsequent drawing is merely a way to 'improve' its performance characteristics." (Def.'s Br. at 21.) Defendant further points out an agent of plaintiff admitted a product could be a monofilament even though it had not undergone a drawing process. (*See id* (citing *Deposition of Gregory P. Watson* in Def.'s Br., Ex. 1 at 69–70).) Defendant argues the Explanatory Notes for heading 8444, HTSUS, which cover machinery used to manufacture monofilaments, describe drawing as a process whereby machines "stretch the filaments to three or four times their original length, a process which orients the molecules in the direction of the filaments thus considerably increasing its length." (*Id.* at 22.) Defendant concludes, "[c]onsequently, it is clear that a drawing process is not required in order for a material to be considered a monofilament." (*Id.*) Defendant further concludes in this case, "the imported monofilament remains a monofilament, but not a drawn monofilament." (Def.'s Reply at 9.)

Third, defendant argues "none of the lexicographic sources, nor language of the HTSUS, restrict monofilaments to articles which are solid, or not porous." (Def.'s Br. at 23.) Defendant cites *Matthews' Textile Fibers*, which states "[a]ll fibers differ greatly * * * and no definite statements can be made regarding their relative porosity." (*Id.*) Defendant explains

> [t]he porosity of the imported monofilament does not "preclude" strength here, as claimed by Baxter. * * * The porosity simply has an effect on the degree of strength the imported monofilament possesses. Therefore, even if strength were necessary for a monofilament, the imported monofilament meets this element.
>
> It is plain that the presence of porosity does not prevent the imported monofilament from being classified as a synthetic monofilament.

(Def.'s Reply at 9–10 (emphasis omitted).)

In addressing plaintiff's fourth contention, defendant maintains plaintiff's arguments regarding decitex "also lack merit" because "[n]othing in the HTSUS limits the term decitex to textile applications." (Def.'s Br. at 24.) Defendant further argues "indeed, the Explanatory Notes to section 5404 of the HTSUS expressly note that monofilaments have several uses, many of which are *not* textile uses." (*Id.*) Defendant also points out plaintiff's expert admitted that use was irrelevant criteria in determining the meaning of the term monofilament. (*See id.*, (*citing Deposition of Gregory P. Watson*, in Def.'s Br., Ex. 1 at 88).)

Finally, defendant argues, in addressing plaintiff's fifth contention, "[n]ot a single authority of *any* nature supports [plaintiff's] theory that monofilaments are only of a certain—and undefined by Baxter—value." (*Id.* at 25.) Defendant concludes "Congress did not impose some arbitrary and amorphous cost limitation in the HTSUS, and Baxter should not be permitted to create it simply because it is beneficial to Baxter." (*Id.*)

After considering the evidence and argument of all parties, this Court finds Customs was correct in concluding the merchandise at issue is a monofilament. This Court notes defendant's conclusion that "every source, including admissions by Baxter, support the determination by Customs that [a] monofilament is defined, as shown in the HSTUS, as one long filament whose cross-section is very small in relation to its length, and [is] generally made through extrusion." (Def.'s Reply at 10.) The statements of plaintiff's agent, Gregory P. Watson, support this Court's conclusion. Although Mr. Watson testified in his deposition that the merchandise at issue was not a monofilament, *see* Pl.'s Opp'n to Def.'s Cross-Mot. for Summ. J. ("Pl.'s Opp'n"), Ex. 2 at 68, his testimony leads to the opposite conclusion. Mr. Watson stated:

> Q. Okay. In order to be a monofilament, must a filament or a monofilament be created or—through a drawing process?
>
> A. By the terminology, I do not believe so.
>
> * * * * * * *
>
> A. Okay. Practically it may be necessary, theoretically not okay. It doesn't have to be, I guess is my answer, if cost wasn't an issue and several other things.
>
> Q. I'm trying to find in your understanding of monofilament does it have to be created through a drawing process?
>
> A. I think the answer would be no.

(Def.'s Br., Ex. 1 at 69–70.) Mr. Watson additionally stated, in responding to defendant's question of whether tensile strength is necessary for a material to be classified as a monofilament:

> Q. [I]s it your understanding then, because of the fact it doesn't have tensile strength, it would not be a filament or a monofilament?
>
> A. I don't think that would necessarily discount it from being a monofilament.

(*Id.* at 74.) Mr. Watson further testified:

> Q. But does the cost of a product itself by definition exclude a material that met all of the other requirements to being a monofilament from being a monofilament?
>
> A. Not solely, no.

(*Id.* at 81–82.) Finally, Mr. Watson stated:

> Q. Does use enter into the definition as to whether a product is a filament or a monofilament?
>
> A. I think my answer would be no.

(*Id.* at 88.) This Court finds it is clear from the above that Customs correctly classified the merchandise as a synthetic monofilament. This Court agrees with defendant's argument that "Baxter made the dispositive factual admissions that under *its* understanding of monofilaments, they *factually* need not possess tensile strength, undergo a drawing process, lack porosity, not be sold in terms of decitex, be used in a medical application, or be high cost." (Def.'s Reply at 4.) Baxter's request that this Court, in considering its "employee's testimony on the meaning of the term 'monofilament,' * * * not afford it great weight" does not alter this Court's decision. (Pl.'s Opp'n at 6.) Plaintiff chose to offer Mr. Watson as a witness for deposition in this case and plaintiff is obligated to abide by the results of Mr. Watson's testimony.

C. *Whether the Merchandise at Issue is Properly Classified as an Unfinished Part:*

Plaintiff argues even if the merchandise at issue were classified as a synthetic monofilament, the HTSUS does not mandate it be classified as a material under heading 5404, HTSUS. Plaintiff contends, rather, the merchandise at issue should be classified as a part or unfinished part of an "artificial respiration apparatus" in subheading 9019.20.0000, HTSUS, or an "electro-medical apparatus" in subheading 9018.90.70, HTSUS.

In HQ 954822, Customs responded to plaintiff's argument and addressed the issue of whether the merchandise at issue could be classified as a part, stating:

> [t]he law governing unfinished articles under the TSUS[] is not the same as that under the HTSUS[]. General Headnote 10(h), TSUS, merely states that a tariff provision covers an article whether finished or not finished. The TSUS[] left up to the court and Customs to set the rules for deciding if an article had been sufficiently processed to be classified as a finished article. On the other hand, GRI 2(a), HTSUS[], though somewhat similar, contains the proviso that *for an incomplete or unfinished article, the unfinished or incomplete article must have the "essential character" of the complete or finished article.*
>
> * * * * * * *
>
> It is the view of the Customs Service that for textile materials, * * * to be classified under the HTSUS as unfinished articles pursuant to GRI 2(a), the identity of the finished articles to be made from those materials must be fixed with certainty. No matter how dedicated to a particular use a material is, it does not have the essential character of a finished article (and remains mere material) if the dimensions of the article to be made from that material are not fixed and certain.
>
> In the instant circumstance, the fiber membranes are imported in 10 kilometer lengths and each oxygenator contains 2.3 kilometers of the imported membrane. Obviously, each length of membrane can be used to supply from one to four oxygenators, with some membrane left over. Accordingly, the dimensions, and therefore, the identity, of the article to be made from the imported goods is nei-

> ther fixed nor certain and those goods may not be classified as unfinished articles.

HQ 954822 (December 22, 1994) (emphasis added).

Plaintiff argues Customs erred in concluding the merchandise at issue is not a part because "Customs erroneously concluded that the OXYPHAN® capillary membrane did not have the essential character of a part of an oxygenator because it is cut to length subsequent to importation." (Pl.'s Br. at 15.) Plaintiff argues while "[t]here is no single test for determining what constitutes a 'part' for tariff classification purposes", the merchandise at issue "meets every accepted definition of the word 'part.'" (*Id.* at 12)

In support of its position, plaintiff also cites Explanatory Note VIII to GRI 3(b), which states "[t]he factor which determines essential character will vary as between different kinds of goods" and further explains the essential character of an article may be determined with respect to the "nature of the material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods." (*Id.* at 16–17 (quoting Harmonized Commodity Description and Coding System, Explanatory Note VIII to GRI 3(b) (1986)).) Plaintiff concludes "[i]n this case, * * * the imported OXYPHAN® capillary membrane has the essential character of a part of Baxter's UNIVOX® oxygenators." (*Id.* at 17.) In support of this contention, plaintiff maintains "the role of the capillary membrane is to oxygenate blood, and the capillary membrane has all the physical characteristics necessary to fulfill this role at the time of importation." (Pl.'s Opp'n at 18–19.)

In addressing plaintiff's argument the merchandise at issue should be classified as a part and not a material, defendant argues "both the HTSUS and judicial precedent demonstrate that monofilaments-even those cut to size or cut to short lengths-cannot comprise a part of an article; the monofilament by definition remains a material." (Def.'s Br. at 26.) Defendant argues only a limited number of specific monofilaments, which have been cut into lengths for individual articles and further manufactured in some additional way so that they are identifiable as new articles, fall outside the statutory scheme and can be considered as more than material. Defendant cites the Explanatory Notes to heading 5404 which provide:

> All these products are generally in long lengths, but remain classified here even if cut into short lengths and whether or not put up for retail sale. They are used according to their different characteristics in the manufacture of brushes, sports rackets, fishing lines, surgical sutures, upholstery fabrics, belts, millinery braids, etc.

(*Id.* (quoting Harmonized Commodity Description and Coding System, Explanatory Notes to Heading 54.04 (1986)).) Defendant also points out the Explanatory Notes state heading 5404 does not include:

> (a) Sterile synthetic monofilament (*heading 30.06*).
> (b) Synthetic monofilament of which any cross-sectional dimension exceeds 1 mm, or strip and flattened tubes (including strip and

> flattened tubes folded along the length), whether or not compressed or twisted (for example, artificial straw), *provided* that the apparent width (i.e., in the folded, flattened, compressed or twisted state) exceeds 5 mm (*Chapter 39*).
>
> (c) Synthetic monofilament measuring less than 67 decitrex of *heading 54.02*.
>
> (d) Strip and the like of *Chapter 56*.
>
> (e) Synthetic monofilament, with hooks attached or otherwise made up into fishing lines (*heading 95.07*).
>
> (f) Prepared knots and tufts for brush-making (*heading 96.03*).[6]

(*Id.* at 26–27 (quoting Harmonized Commodity Description and Coding System, Explanatory Notes to Heading 54.04 (1986)).) Defendant concludes:

> [t]he Explanatory Notes specify that only a limited number of specific monofilaments which have been cut into lengths for individual articles *and* were further manufactured in some additional way so that they are identifiable as the new article, fall outside of this statutory scheme, and can be considered more than material.

(Def.'s Br. at 27.) Contrary to the distinguishing characteristics set forth in the Explanatory Notes, defendant argues the merchandise at issue in this case is not additionally processed in any manner until after it is imported, and, as a result, "the imported monofilament remains a material—synthetic monofilament—rather than a part of an unfinished part of another product, until after importation when it is prepared for use, by combining with other monofilaments, wrapping, cutting, recutting, and assembling into its final configuration for use in oxygenators." (*Id.* at 28–29.)

Defendant additionally argues "in light of the fact that the imported monofilament remains a material classifiable as synthetic monofilament pursuant to the language of the heading 5404, HTSUS, and the imported monofilament cannot, as a matter of law, be considered a part or an unfinished part, GRI 2(a) does not apply in this action." (*Id.* at 30–31.) Defendant argues if the merchandise at issue were considered to have the essential character of the finished oxygenator, "[a]lmost any material would have the essential character of the finished good into which it is to be made or incorporated, because a manufacturer's specifications imitates the finished properties (special design, composition, or construction). This could not have been the intention of the drafters of GRI 2(a)." (*Id.* at 32.) Defendant further argues even if GRI 2(a) did apply, "the imported monofilament here does not have the essential char-

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[6] Plaintiff disagrees with defendant's explanation of the Explanatory Notes' list of monofilaments excluded from heading 5404 and argues the defendant's rule "that an article must be processed to be removed from classification in HTSUS heading 5404" is "a rule to which even Customs does not adhere." (Pl.'s Opp'n at 16.) Plaintiff argues the more logical explanation of why these articles are listed in the Explanatory Notes "is that they are examples of products that are specifically described elsewhere in the tariff schedule, or are articles that do not meet the very terms of the heading." (*Id.* at 17.) In response to this argument, defendant maintains

> Baxter's hypothesis * * * first ignores the Explanatory Note dictate[s] (sic) that monofilaments remain classified in heading 5404 "even if cut into short lengths and whether or not put up for retail sale." Under Baxter's reasoning, this Explanatory Note language is extraneous as all monofilaments would be classified under this heading unless specifically described elsewhere, regardless if the monofilament was cut into short lengths or not.

(Def.'s Opp'n at 11–12.)

acter of a part of an oxygenator; it has the essential character of monofilament." (*Id.* at 31) Defendant explains

> Here, the essential character of the imported monofilament is a filament, and not an oxygenator. Most obviously, the imported monofilament meets every quality of a monofilament. In order to become an oxygenator, on the other hand, the imported monofilament must undergo significant transformation from a monofilament. * * * The essential character of oxygenator cartridges appears to be the spiraled monofilaments wrapped into its final configuration around the bellows, sealed in the cartridge and cut into thousands of exposed pieces, ready for use as oxygenators, not the imported monofilament.

(*Id.*) Defendant additionally argues the merchandise at issue does not have the essential character of a part of an oxygenator because "one, if not more, of its crucial dimensions are not set upon importation" (*id.* at 32 (citations omitted)), and "the imported monofilament must undergo significant transformation from a monofilament into an oxygentor." (Def.'s Reply at 12–13.) Defendant further responds to plaintiff's argument the number of oxygenators to be created from each spool is known prior to importation by contending

> Baxter failed to, and indeed, cannot, demonstrate that the lengths of the imported monofilament as imported *can* oxygenate blood alone, or contain all of the necessary physical characteristics to oxygenate blood. It is only after the imported monofilament is unwound from the spool, twisted with additional monofilaments, rewound around bellows, cut, encased, sealed with polyurethane, and recut, that the article obtains the "properties" to oxygenate blood.

(*Id.* at 13.) Defendant concludes "[b]ecause the imported monofilament does not have the essential character of an oxygenator, and the dimensions, and therefore, the identity, of the imported monofilament is neither fixed nor certain at importation, Baxter's argument that the imported monofilament may be classified as unfinished parts, must fail." (Def.'s Br. at 35.)

This Court notes the question of whether merchandise is classified as a material or as an unfinished part is determined on a case-by-case basis. *See The Harding Co. v. United States*, 23 CCPA 250 (1936) (brake lining imported in rolls measuring 100 feet in length and used to make different sized brake shoes was not classified properly as "parts of automobiles" but rather as "asbestos yarn" because merchandise was not cut to length or marked to indicate where it was to be cut); *Benteler Indus., Inc. v. United States*, 17 CIT 1349, 840 F. Supp. 912 (1993) (articles used exclusively as side door impact beams were classified as "parts" rather than "material" even though they were cut to length subsequent to importation because the imported pipes required no additional parts or as-

sembly)[7]; *J.E. Bernard & Co., Inc. v. United States*, 50 Cust. Ct. 41, 50, C.D. 2386 (1963) (tempered and polished bands or strips of steel with saw teeth imported in coils of 100 and 500 feet were properly classified under the provision for "steel bandsaws" rather than "manufactures of steel, not specifically provided for," because "[a]ll that remains to be done in this country to prepare the merchandise for its ultimate use is to cut and weld the bandsaw to the length desired for the particular machine with which it is to be used" and that at the time of importation the character and identity of the article as a steel bandsaw was fixed with certainty).

Unlike the merchandise in *J.E. Bernard & Co.*, and *Benteler Industries*, the Court finds from the evidence before it in this case, the identity of the merchandise at issue is not known with the same certainty. While plaintiff argues that "[o]ther than length, no dimension of the imported merchandise was modified between its condition as imported and when the merchandise is actually used as a part of plaintiff's blood oxygenator", (Pl.'s Stmt. of Mater. Facts at 5), defendant maintains "absolutely nothing is 'predetermined' in the winding of the imported monofilament" (Def.'s Reply at 15), because

> after substantial processing, the imported merchandise was cut to finished lengths of approximately 9½ inches for use in one or more of plaintiff's oxygenators. * * * [A]fter importation, the dimensions of the imported monofilament material change, as it is transformed into a new spiraled material. The process of spiral wrapping the imported monofilament with the polyester monofilament created a new material with different dimensions and characteristics. It has new decitex and cross-sectional dimensions, and it takes on a new shape. When this material is cut after the bellows are filled, the length dimensions change. When the spiraled material is ultimately cut into thousands of short lengths for use in an oxygenator, the dimensions are changed again.

(Def.'s Resp. to Pl.'s Stmt. of Mater. Facts at 6.) This Court notes defendant's explanation

> [t]he product is simply a spool of monofilament material, not emerging oxygenator filters. * * * Where to cut cannot be preset or predetermined prior to importation because when the bellows will be filled is dependent on changing variables, such as variances in the size of the bellows and the cross-sectional dimensions of the monofilaments used.

(Def.'s Br. at 34–35). This Court further notes defendant's explanation

> Baxter's machine was, at best, programmed to stop winding when the outside diameter of the last turn on a specific bellow was a specified length. Because each bellows was different, and the width of each length of imported monofilament deviated, the number of turns which were required to fill a specific bellows varied for each

[7] The Court notes defendant's observation that *Benteler* was decided under the TSUS, which contained a different standard from HTSUS heading 5404, which provides even if a material is cut to shorter lengths, it remains a material unless advanced to a stage where it is identifiable as a finished article.

> and every bellows. Therefore, the length of imported monofilament required to fill each bellows changed with each bellows wrapped, and the number of turns required to fill each bellows, was *not*, and *cannot*, by definition, be predetermined. Baxter's contentions to the opposition (sic) are simply disingenuous.

(Def.'s Reply at 15.)

This Court finds the imported merchandise cannot be classified as unfinished parts. The Court finds unlike the imported merchandise in *Benteler*, which, as imported, consisted of the final article, the imported monofilament here is not an oxygenator, but is a single material which is used, along with several other materials, to create oxygenators. This Court also finds Customs' explanation in HQ 954822, in interpreting GRI 2(a), that

> [i]n the instant circumstance, the fiber membranes are imported in 10 kilometer lengths and each oxygenator contains 2.3 kilometers of the imported membrane. Obviously, each length of membrane can be used to supply from one to four oxygenators, with some membrane left over. Accordingly, the dimensions, and therefore, the identity, of the article to be made from the imported goods is neither fixed nor certain and those goods may not be classified as unfinished articles

(HQ 954822 (December 22, 1994)) is correct.

D. *Whether the Merchandise is Properly Classified as Part of an Artificial Respiration Apparatus in HTSUS Subheading 9019.20.0000 or as Electro-Medical Apparatus in HTSUS subheading 9018.90.7080:*

After arguing the merchandise at issue should be classified as a part, instead of as a material within subheading 5404, HTSUS, plaintiff presents the Court with two alternative subheadings under which it argues the merchandise at issue should be classified. Although this Court has already determined the merchandise at issue cannot be classified as a "part", it will address briefly plaintiff's argument the merchandise at issue should be classified as part of an "artificial respiration apparatus" or as part of an "electro-medical apparatus".

Plaintiff argues the merchandise at issue should be classified as part of an "artificial respiration apparatus" in subheading 9019.20.0000, HTSUS. Because the HTSUS does not define this term, plaintiff looks to its commercial or common meaning and argues "the UNIVOX® oxygenators are 'artifical respiration apparatus'" under subheading 9019.20.0000, HTSUS. (Pl.'s Br. at 22.) Plaintiff maintains the definition of artificial respiration as a "'method to restore respiration in cases of suspended breathing'" as well as "'the maintenance of respiratory movements by artificial means'" demonstrates artificial respiration "is not limited to the maintenance of respiratory movements, but also includes restoration of respiration." (Pl.'s Opp'n at 28 (quoting *Taber's Cyclopedic Medical Dictionary* 138, 1476–77 (15th ed. 1985)).) Plaintiff concludes artificial respiration also includes man-made methods of plac-

ing air "'in intimate contact with the circulating medium (as blood) of a multicellular organism *whether by* breathing, diffusion through gills or blood surface, or other means'" (*Id.* (quoting *Webster's Third New International Dictionary* 1934 (1971) (emphasis added by plaintiff))) and "[t]he oxygenator made by Baxter meets this definition because it places oxygen in intimate contact with a patient's blood through the process of diffusion." (*Id.* at 28–29.)

Defendant argues "[e]ven assuming for the sake of argument that Baxter is correct that the imported monofilament could somehow be considered a 'part' of an oxygenator, rather than as 'material'", (Def.'s Br. at 36),

> [i]t is clear, most obviously, that there is no authority whatsoever that suggests that artificial respiration is equivalent to "man-made methods" of respiration. Further, based upon either definition in *Taber's*, the oxygenator does not perform artificial respiration. The oxygenator does not maintain respiratory "*movements;*" it does not "*restore*" respiration. It is simply a machine designed to oxygenate blood until respiratory movements can be restored by another means.
>
> Secondly, the exemplars in the Explanatory Notes demonstrate that heading 9019.20 covers only apparatuses which actually perform the act of physical respiration, forcing air in and out of the lung. Not a single example suggests that 9019.20 covers articles outside of the definition of artificial respiration apparatus, such as those which simply oxygenate blood when blood alone is passed through them.

(Def.'s Reply at 18.) Defendant concludes the Explanatory Notes demonstrate that while heading 9019.20, HTSUS, covers only apparatus which actually perform the act of physical respiration or respiratory or breathing functions, "Baxter's oxygenators do not perform these or any similar breathing operations" but instead "simply oxygenate blood circulated through the oxygenator" and are, therefore, "not *ejusdum generis* with the articles listed in heading 9019.20." (Def.'s Br. at 38.)

This Court concludes even if the merchandise at issue were classified as a part, it would not be classified as part of an artificial respiration apparatus. Common lexigraphic sources support defendant's argument. *See, e.g., Dorland's Illustrated Medical Dictionary* 1448 (28th ed. 1994) (defining artificial respiration as "any method of forcing air into and out of the lungs of a person who has stopped breathing"); *Taber's Cyclopedic Medical Dictionary* 126–27, 1239 (14th ed. 1981) (defining artificial respiration as "[a]rtificial methods to restore respiration in cases of suspended breathing" and "maintenance of respiratory movements by artificial means"). The Court finds the merchandise at issue simply does not perform the act of artificial respiration as it is defined by common and commercial meaning.

This Court also notes plaintiff's alternative argument "[b]ecause [the oxygenators are] used in medical science for blood oxygenation and an oxygenation system requires electricity to operate, Baxter's oxygenator

is an electro-medical apparatus" properly classified under subheading 9018, HTSUS. (Pl.'s Br. at 23.) This Court also notes defendant's counter argument if the imported monofilament is classifiable as part of an oxygenator, the proper classification is as part of electro-surgical appliance and apparatus, under subheading 9018.90.60, HTSUS, because Baxter's oxygenators function as the apparatus named in that subheading and are *ejusdum generis* with items classified in that subheading.

Because this Court has determined the merchandise at issue is a material rather than a part, and was properly classified by Customs under subheading 5014, HTSUS, the Court will not address further the parties' proposed alternative classifications. This Court also finds it need not address plaintiff's arguments regarding Additional Rule of Interpretation 1(c) and its mandate that a part must be classified in a parts provision if the parts provision most specifically describes the part, or plaintiff's claim the merchandise at issue should also be classified as a part because each is a use provision, and a use provision prevails over an eo nomine provision.[8] Finally, the Court finds plaintiff's contention "Note 2 to Chapter 90 governs classification of parts of articles of Chapter 90, and requires the capillary membrane to be classified in Chapter 90" (Pl.'s Opp'n at 26)[9], is inapplicable because, as defendant points out, "Note 2 only dictates the classification of articles which are *parts* and are goods falling in certain headings in Chapter 90. If the imported product is *not* a part-as here-it cannot be a part which is a good falling within Chapter 90. Note 2 therefore does not apply on its face." (Def.'s Reply at 16–17.)

CONCLUSION

For all the reasons discussed above, this Court denies plaintiff's Motion for Summary Judgment and grants defendant's Cross-Motion for Summary Judgment, finding Customs correctly classified the merchandise at issue as a material under subheading 5404.10.8080, HTSUS, instead of as a part under either of plaintiff's two alternative proposed subheadings. This Court denies plaintiff's Motion for Oral Argument because it finds the issues presented have been made clear by the briefs submitted.

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[8] A use provision is one where classification is defined by the use of an article whereas an *eo nomine* provision is one which describes merchandise by a specific name, usually one well-known in the trade, which includes all forms of the article as if each were provided for by name in the tariff provisions.

[9] Note 2 to Chapter 90, HTSUS, provides that parts which are goods falling within certain headings in Chapter 90, including those headings at issue, are, if suitable for use solely or principally with a particular kind of machine, to be classified with the machines of that kind.

(Slip Op. 98–17)

U.S. STEEL GROUP A UNIT OF USX CORP., USS/KOBE STEEL CO., AND KOPPEL STEEL CORP., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND SIDERCA S.A.I.C. AND SIDERCA CORP., DEFENDANT-INTERVENORS

Consolidated Court No. 95–09–01144

[Commerce's remand determination affirmed]

(Decided February 25, 1998)

Skadden, Arps, Slate, Meagher & Flom (Robert E. Lighthizer, John J. Mangan) for Plaintiffs U.S. Steel Group a Unit of USX Corp., USS/Kobe Steel Co., and Koppel Steel Corp.

Schagrin Associates (Roger B. Schagrin, R. Alan Luberda) for Plaintiff-Intervenor Maverick Tube.

Wiley, Rein & Fielding (Charles Owen Verrill, John R. Shane) for Plaintiff-Intervenor North Star Steel.

Frank W. Hunger, Assistant Attorney General; *David M. Cohen,* Director; *Velta A. Melnbrencis,* Assistant Director, Dept. of Justice, Civil Division, Commercial Litigation Branch; *Barbara Campbell-Potter,* Attorney-Advisor, Office of the Chief Counsel for Import Administration, Dept. of Commerce, for Defendant.

White & Case (David P. Houlihan, Gregory J. Spak, Christopher M. Curran, Richard J. Burke) for Defendant-Intervenors Siderca S.A.I.C. and Siderca Corp.

OPINION

POGUE, *Judge:* On July 14, 1997, this Court remanded certain aspects of the International Trade Administration's final determination in *Oil Country Tubular Goods from Argentina*, 60 Fed. Reg. 33,539 (Dep't Commerce 1995)(final det.) ("Final Determination"). *U.S. Steel Group v. United States*, 973 F. Supp. 1076 (CIT 1997)*("U.S. Steel").*[1]

The remand Order directed Commerce to reconsider its treatment of miscellaneous income as an offset to respondent Siderca's general and administrative costs ("G&A") and the adjustment of Siderca's cost of production ("COP") to account for the reintegro tax rebate. Petitioners U.S. Steel Group A Unit of USX Corp., USS/Kobe Steel Co. and Koppel Steel Corp. ("petitioners" or "U.S. Steel") object to Commerce's remand determination.

DISCUSSION

I. Miscellaneous Income Offset to G&A Expenses

In calculating Siderca's COP, the Department's calculation of general and administrative expenses included an offset for "miscellaneous income" comprised of revenues from: (1) sales of technical assistance to other steel companies; (2) sales of tubes purchased from other countries and resold in other countries; and (3) sales of intermediate products. Final Results Redet. Pursuant Crt. Remand at 1 ("Remand Determination").

In the Final Determination, Commerce explained its decision to allow the offsets, stating, "miscellaneous income relating to production op-

[1] Familiarity with the Court's earlier decision in this case is presumed.

erations of the subject merchandise may be permitted as an offset to G&A." The Court found Commerce's statement to be a permissible construction of the statute. *See U.S. Steel*, 973 F. Supp. at 1088 ("The antidumping law * * * does not define cost of production nor does it include a discussion of miscellaneous profit as an offset to cost. When a statute is silent or ambiguous, the court must defer to Commerce's reasonable interpretation.")(citing *Daewoo Elec. Co., Ltd. v. Int'l Union of Elec., Technical, Salaried and Mach. Workers*, 6 F. 3d 1511, 1516 (Fed. Cir. 1993)).

In its brief to this Court, Commerce revised its statement of the legal standard for permitting offsets to G&A, arguing that "[it] is Commerce's practice, * * * to permit offsets to expenses for revenue relating to the respondent's general production operations." (Def.'s Mem. Opp'n. Mot. Siderca S.A.I.C. and Siderca Corp. and Partial Opp'n. Mot. U.S. Steel Group a Unit of USX Corp. et. al. J. Agency R. at 67). The Court rejected Commerce's revision as a post hoc rationalization by agency counsel. *U.S. Steel*, 973 F. Supp. at 1089. The Court also found that Commerce had failed to cite evidence to support its conclusion that the miscellaneous income was related to the production operations of the subject merchandise. Therefore, the Court remanded, asking that Commerce reconsider its treatment of Siderca's miscellaneous income.

In the Remand Determination, Commerce explained,

> the standard described in the *Final Determination* * * * *i.e.*, that the miscellaneous income items at issue be related to production of *the subject merchandise*, does not accurately reflect the appropriate criteria for analyzing whether such items should be included in our calculation of G&A for Siderca * * *. [W]here these or other items of expense or income bear a close relationship to production of the subject merchandise, they may be more accurately accounted for as part of the COM [cost of manufacture] of that merchandise. On the other hand, where, * * * items of income and expense are most closely related to the general operations of the company (all general activities associated with the company's core business), it is appropriate to treat those items as part of G&A * * *.

Remand Determination at 5. After calculating a company's total G&A expenses, Commerce allocates a portion of those expenses to the subject merchandise. In allocating G&A, Commerce calculates a "G&A rate" by dividing the company's G&A expenses by the total cost of manufacture of all products sold. This rate is then multiplied by the per-unit cost of manufacture of a product in order to derive the portion of total G&A to be allocated to that product. Remand Determination at 5. An offset to G&A would be allocated similarly.

Petitioners argue that the standard articulated by Commerce in the Remand Determination is inconsistent with the statute. "The statute unambiguously requires that the cost of production to be used in an antidumping case is 'the cost of producing the merchandise in question * * *'" Comments of U.S. Steel Group a Unit of USX Corp., USS/Kobe Steel Co., and Koppel Steel Corp. on the Final Results of Redetermina-

tion Pursuant to Court Remand at 7–8 ("U.S. Steel Comments") (citing 19 U.S.C. § 1677b(b)(1994)).

Commerce contends that limiting offsets to G&A expenses to income from activities related to "production of the subject merchandise" would be inconsistent with the accounting allocation concept of G&A expenses.

Commerce's argument is persuasive. "G&A expenses are those expenses which relate to the activities of the company as a whole rather than to production process." *Rautaruukki Oy v. United States*, Slip Op. No. 95–56 (CIT March 31, 1995). Commerce's decision that offsets to G&A expenses should also be related to the company's general operations—comprised of all general activities associated with the company's core business, including production of the subject merchandise—is a reasonable application of the statute.

1. *Sales of Technical Assistance:*

Petitioners argue that revenues from Siderca's sales of technical assistance to other steel companies should not be used to offset Siderca's G&A expenses because these sales constitute "a distinct and separate activity for Siderca."

Commerce argues, on the other hand, that miscellaneous technical assistance provided to other companies relates to Siderca's general production activities because the primary function of the personnel providing these services is to provide in-house production assistance and technical services to Siderca's own steel goods customers.

In response, petitioners state that "there is no record evidence to show that the personnel who provide technical assistance to other steel companies are in fact the same individuals who provide technical services to OCTG [oil country tubular goods] customers." U.S. Steel Comments at 12.

The Court finds Commerce acted appropriately in accepting Siderca's characterization of these sales.

Siderca describes these sales as an incidental accessory to its core production activities and treats them that way in its accounting records.[2] *See* Cost Verification Report Ex. 20. The relative insignificance of this account supports this characterization as does the nature of the activity at issue. Because a manufacturing company such as Siderca would be expected to employ a corps of technical staff to support its manufacturing activities, it was reasonable for Commerce to accept Siderca's representation that the personnel providing technical assistance to other companies were primarily employed to provide in-house support for Sid-

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[2] In its underlying opinion in this case, the Court stated that Siderca's treatment of the costs related to its miscellaneous sales in its accounting records did not constitute sufficient evidence to support Commerce's decision to use the revenue from these sales to offset G&A costs. *U.S. Steel*, 973 F. Supp. at 1088. However, in that case, the Court was relying on Commerce's assertion that income related to production *of the subject merchandise* could be used to offset general and administrative costs. The inclusion of these items in Siderca's miscellaneous sales account did not support the notion that these items were related to the production of the subject merchandise. However, it does lend support to Commerce's decision that they should not be treated as separate and distinct from Siderca's general production activities.

erca's core production activities and assistance to Siderca's OCTG customers.

Furthermore, given the relative insignificance of this account, Commerce's acceptance of Siderca's description without further verification was appropriate. "Commerce is not required to examine in detail every aspect of a respondent's questionnaire." *PMC Specialties Group, Inc. v. United States*, Slip Op. 96–153 (CIT Aug. 30, 1996).

> Verification is like an audit, the purpose of which is to test information provided by a party for accuracy and completeness. Normally, an audit entails selective examination rather than testing of an entire universe. Hence, evasion is a common possibility, but only when audits uncover facts indicating the actuality thereof are auditors compelled to search further.

Bomont Industries v. United States, 14 CIT 208, 209–210, 733 F. Supp. 1507, 1508 (1990). Here, Commerce uncovered no facts to indicate that Siderca's reporting was improper or evasive. Therefore, the Court finds, Commerce's acceptance of Siderca's description of this activity was appropriate, and its decision to include this item as an offset to G&A was supported by substantial evidence.

2. *Sales of Tubes Purchased in Third Countries and Exported to Other Countries:*

Petitioners argue that Siderca's sales of tubes purchased from third countries and then resold to other countries constituted a separate and distinct business activity and that the revenues from this activity should not have been used to offset Siderca's G&A expenses.

Both Commerce and Siderca acknowledge that confusion exists as to the nature of these tubes. Prior to and during verification they were simply described as purchased tubes, while in Siderca's case brief, submitted after verification, they are described as purchased OCTG. Commerce explains in the Remand Determination that "[b]ecause a pipe manufacturer may use tubes for maintenance on its facilities or as a raw material in making the subject merchandise, we concluded that the disposal of such items was a normal G&A activity for a pipe manufacturer." Remand Determination at 9.

In response, domestic producers argue, "[t]here is not a single shred of evidence on the record that Siderca used these tubes for any such purposes." U.S. Steel Comments at 16–17.

Again, however, the Court finds Commerce acted within its discretion in accepting Siderca's characterization of this activity as ancillary to its core manufacturing activities. Like Siderca's sales of technical assistance, these sales were included in Siderca's miscellaneous sales account. They were not treated as a separate line of business in Siderca's accounting records.

Furthermore, Commerce explained that, "the small value in this account in itself demonstrates that it is neither a major line of business for Siderca nor a significant financial transaction * * *." Remand Determination at 10. Although the size of the account is not dispositive as to

the issue of whether the activity is related to Siderca's core production activity, the Department has the discretion to consider this a factor in evaluating the nature of the activity.

Finally, this activity, like sales of technical assistance could reasonably be considered to be related to Siderca's core manufacturing activities.

3. *Sales of Intermediate Products:*

Petitioners do not dispute that Siderca's production and sale of intermediate products, such as sponge iron and bar, are connected to Siderca's general production operations. However, petitioners argue, the income offset to G&A was improper because the record fails to establish whether the costs relating to the production and sale of the intermediate products were included in the cost of manufacturing or in general expenses. U.S. Steel Comments at 17–18. "Where the costs for an activity are in COM or cost of goods sold ["COGS"], then the revenues generated by the activity must be applied to reduce the COGS * * *." *Id.* at 18–19.

In its response, Commerce states that "[t]he costs associated with these miscellaneous sales are not included in the COGS account, but are recorded in the other income and expense account." Remand Determination at 26. As evidence for this statement, Commerce provided the Court with excerpts from Siderca's Cost Verification. Cost Verification Report Ex. 20. This document demonstrates that Siderca's "Ventas Diversas," or miscellaneous sales sub-account, which is contained within the "other income and expense account" is comprised of eight line items including "Barras" (bars), "Hierro esponja" (sponge iron) and "Costo Vtas Diversas" (cost of miscellaneous sales).

The Court finds this document constitutes substantial evidence to support Commerce's finding that the costs associated with Siderca's sales of intermediate products are included in its general expenses account, along with the revenues from those sales.[3] Commerce was not required to take further steps to verify Siderca's assertion that the costs contained in the "Costos Vtas Diversas" line related to the sales at issue here. *See* discussion *supra* section I.1.

U.S. Steel also argues that if the Court concludes that the costs are included in the miscellaneous account, then the offset must still be denied because the costs are included in the basket category Costo Ventas Diversas. This category includes the costs of the intermediate products as well as costs associated with Siderca's buying and reselling of tubes in third countries. Response of U.S. Steel Group a Unit of USX Corp., USS/Kobe Steel Co., and Koppel Steel Corp. Court's Dec. 23, 1997 Order at 1. "In order to calculate the offset relating to intermediate products," U.S.

[3] U.S. Steel also argues that in the final determination, Commerce stated that the costs for intermediate products were captured in Siderca's overall variance, i.e., in the cost of manufacturing. Furthermore, U.S. Steel notes, Siderca has gone back and forth regarding the question of how these costs were treated in Siderca's accounting records. For that reason, U.S. Steel argues, "there is no substantial evidence on record to show where these costs have been captured," U.S. Steel Comments at 23. Although U.S. Steel is correct, that both Commerce and Siderca have equivocated over this question, that does not change the fact that in the remand determination at issue here, Commerce had substantial evidence to support its position.

Steel maintains, "the Department of Commerce * * * must determine the net profit derived from such sales (*i.e.*, revenues minus cost). The Department cannot perform such a calculation here because the costs for the intermediate products are aggregated with those for the brokering of tubes." *Id.* at 1–2.

The Court does not agree. Although Commerce may not be able to calculate profits for individual items within Siderca's miscellaneous sales subaccount, the revenue and expense information does permit calculation of net revenue for the subaccount as a whole. Because the Court has concluded that all three categories of revenue (purchased tubes, intermediate products and technical assistance) are appropriate as offsets, Commerce can simply subtract the total expenses from the total revenues to arrive at an appropriate figure to be used for miscellaneous income.

II. *Deduction of Siderca's Indirect Tax Rebate from COP:*

The Government of Argentina has adopted a cumulative, indirect tax system pursuant to which certain indirect taxes are imposed at various stages of production, become embedded in the price of the product at those stages, and are passed on to the next stage through the price of the intermediate product. The Government of Argentina also has a tax rebate program (the reintegro program), which provides for government rebate, upon export, of indirect taxes imposed and embedded in the price of the finished product.

In calculating Siderca's cost of production for its Final Determination, Commerce deducted the full amount of the rebate Siderca received for its sales to the People's Republic of China.[4] Petitioners argued that Commerce should only deduct that part of the rebate attributable to taxes on material inputs of the subject merchandise. In response, Commerce stated, "[t]o be non-countervailable, the rebate must be for taxes on merchandise which was physically incorporated into the exported product and the rebate must be no greater than the actual taxes imposed." Final Determination at 33,546. Commerce added, "[b]ased on the fact that the Department has previously determined that Siderca was entitled to a rebate without incurring countervailing duties and because [Siderca] currently accepts a lower rebate, it is reasonable to assume that the entire reintegro is attributable only to material inputs." *Id.*

In its brief, however, Siderca acknowledged that the reintegro rebates taxes on various cost elements other than material inputs. (Mem. P&A Def.-Ints. Siderca S.A.I.C. and Siderca Corp. Opp'n. Pls.' Mot. J. Agency R. at 30). Therefore, pursuant to Commerce's request, the Court remanded this issue to give Commerce the opportunity to correct its error.

In its Remand Determination, Commerce agrees with Siderca that "[t]he amount of taxes rebated on sales to third countries is attributable

[4] During the course of its investigation, Commerce determined that Siderca's home market (Argentine) sales were not viable during the period of investigation and therefore based foreign market value upon sales of OCTG to the People's Republic of China, pursuant to 19 U.S.C. § 1677b(a)(1)(B). *See U.S. Steel*, 973 F. Supp. at 1079.

to a wide range of taxes embedded in each element of Siderca's COP (*i.e.*, materials, labor, factory overhead, and G&A expenses)." Remand Determination at 11. However, both Commerce and Siderca also agree that the legal standard articulated by the Department in the Final Determination was incorrect and that "a fair comparison [between cost of production and price] requires that, when performing the cost test on [the People's Republic of China] sales, all of the refunded taxes be deducted from the COP." Remand Determination at 13.

Petitioners argue that the legal standard articulated in the Final Determination was correct, that the statutory definition of constructed value permits the deduction of only those tax rebates attributable to material inputs, and that the same standard applies when the department is calculating cost of production. Constructed value is defined as follows:

> [T]he constructed value of imported merchandise shall be the sum of—
>
> (A) the cost of materials (exclusive of any internal tax applicable in the country of exportation directly to such materials or their disposition, but remitted or refunded upon the exportation of the article in the production of which such materials are used) and of fabrication or other processing of any kind employed in producing such or similar merchandise * * *.

19 U.S.C. § 1677b(e)(1).

Petitioners argument is based on the maxim *expressio unius est exclusio alterius*, "where Congress * * * has carefully employed a term in one place and excluded it in another, it should not be implied where excluded." *Old Republic Ins. Co. v. United States*, 10 CIT 589, 595, 645 F. Supp. 943, 949 (1986) (citing *Marshall v. Western Union Tel. Co.*, 621 F. 2d 1246, 1251 (3d Cir. 1980)). Specifically, petitioners argue that because Congress explicitly excluded rebated taxes paid on material inputs from the calculation of constructed value, rebated taxes paid on non-material inputs should not be excluded.

Commerce maintains that "the existence of [a] phrase, explicitly providing for the exclusion of one group of commonly-incurred internal taxes * * * does not prohibit us from recognizing instances where other internal taxes are rebated and, thus, are not an actual cost to the respondent."[5]

The court, in reviewing Commerce's construction of the statute, follows a two-step process. In the first step, the court must look to whether Congress has directly spoken on the issue. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842, 104 S.Ct. 2778, 2781 (1984). "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 843. The court reaches the second step if it finds the statute to be silent or ambiguous. If so, "the

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[5] Commerce also disputes petitioners' contention that the constructed value provision is applicable to calculation of cost of production. Because the Court rejects petitioners' interpretation of the constructed value provision, the Court need not reach the question whether the same standard applies to both constructed value and cost of production.

question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843, 104 S.Ct. At 2782.

A good deal of confusion exists over the principles a court should apply in attempting to determine legislative intent for purposes of *Chevron* step one. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 454, 107 S.Ct. 1207, 1225 (1987) (Scalia, J. dissenting) ("The Court * * * implies that courts may substitute their interpretation of a statute for that of an agency whenever, '[e]mploying traditional tools of statutory construction,' they are able to reach a conclusion as to the proper interpretation of the statute * * *. But this approach would make deference a doctrine of desperation, authorizing courts to defer only if they would otherwise be unable to construe the enactment at issue."); *see also* Davis and Pierce, I *Administrative Law Treatise* § 3.6 (3d ed. 1994) ("This brief digression on the widely differing ways in which the Justices define and apply 'traditional tools of statutory construction' helps to highlight the importance of the as yet unresolved debate among the Justices concerning the meaning of the *Chevron* test. If reviewing courts are free to use any combination of the 'traditional tools of statutory construction' they choose in the process of applying *Chevron* step one, few if any cases will reach *Chevron* step two. It is the very indeterminacy of the 'traditional tools' that gives judges the discretion to make policy decisions through the process of statutory construction.")

The use of the *expressio* maxim is particularly controversial. As the court noted in *Caterpillar Inc. v. United States*, 941 F. Supp. 1241 (CIT 1996), *appeal dismissed per stipulation* 111 F. 3d 143 (Fed. Cir. 1997), "[t]he Supreme Court itself impugned the canon when it nodded approvingly to a law review article which 'recogniz[ed] that the principle *expressio unius est exclusio alterius* "is a questionable one in light of the dubious reliability of inferring specific intent from silence."' *Pauley v. Bethenergy Mines, Inc.*, 501 U.S. 680, 703, 111 S. Ct. 2524, 2537–38 (1991) (quoting Cass R. Sunstein, *Law and Administration After Chevron*, 90 Colum. L. Rev. 2071, 2109, n. 182 (1990))." *See also Cheney R.R. Comp. v. I.C.C.*, 902 F.2d 66 (D.C. Cir. 1990) ("Scholars have long savaged the expressio canon. * * * Whatever its general force, we think it an especially feeble helper in an administrative setting, where Congress is presumed to have left to reasonable agency discretion questions that it has not directly resolved.").

U.S. Steel cites *King v. Briggs*, 83 F.3d 1384 (Fed. Cir. 1996), as an example of a case in which a court relied on the *expressio* maxim within the context of a *Chevron* analysis. *See* Response of U.S. Steel Group a Unit of USX Corp., USS/Kobe Steel Co., and Koppel Steel Corp. Court's Dec. 23, 1997 Order at 3. In fact, however, *Briggs* did not involve a *Chevron* analysis. The question in *Briggs* involved the jurisdiction of the Merit Sys-

tems Protection Board, "a question of law," the court said, "that we review de novo."[6]

The *Briggs* court applied the *expressio* maxim to the provision at issue only after concluding that the resulting interpretation would be consistent with parallel employment provisions within the U.S. Code. Thus, the Court is not convinced that the outcome in *Briggs* supports the use of the *expressio* maxim in this case. Instead, the Court finds that the case at hand is more similar to *Daewoo Elecs. Co. v. Int'l Union Elec. Technical, Salaried and Machine Workers*, 6 F.3d 1511 (Fed. Cir. 1993) than to *Briggs*. In *Daewoo*, the court considered a provision of the antidumping statute that provides for an assessment "cap" when estimated duties are paid in cash. The statute is silent as to the treatment of estimated duties paid with bonds. The court, carrying out a *Chevron* analysis, declined to apply the *expressio* maxim and instead deferred to Commerce's interpretation that the cap should also apply to bond deposits. "This provision simply does not speak to whether estimated duty bonds cap antidumping duties. Given this silence * * * we cannot say that the ITA's allowance of a duty ceiling for bonds is contrary to the statute." *Daewoo* at 1521.

Similarly, in this case, the provision does not speak to whether rebated indirect taxes paid on non-material inputs may be excluded from constructed value. Given this silence, the Court can not find that U.S. Steel's interpretation represents "the unambiguously expressed intent of Congress," required under *Chevron* step one. The provision at issue is not one in which "that which is expressed is so set over by way of strong contrast to that which is omitted that that which is omitted must be intended to have opposite and contrary treatment." *See Ford v. United States*, 273 U.S. 593, 611, 47 S. Ct. 531, 537 (1926). Thus, the Court finds the statute to be sufficiently ambiguous to require deference to Commerce's interpretation, if that interpretation is reasonable.

Commerce's methodology represents a reasonable attempt to comply with the statutory mandate to rely on actual costs in calculating cost of production, *see IPSCO, Inc. v. United States*, 965 F. 2d 1056, 1059 (Fed. Cir. 1992) ("By its terms, the statute expressly covers actual production costs."), as well as the mandate to "determine current margins as accurately as possible." *Rhone Poulenc, Inc. v. United States*, 899 F. 2d 1185, 1191, 8 Fed. Cir. (T) 61, 67 (1990). Commerce explained, "we found that, on its sales to the PRC, Siderca received back a portion of the total direct and indirect taxes that are included in its reported COPs. * * * There-

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[6] The issue in *Briggs* was whether a federal employee who had been exempted by statute from certain specific protections contained in the Civil Service Reform Act of 1978 (CSRA) was also exempt from other unspecified protections. Specifically, the question in *Briggs* was whether the employee was entitled to a hearing before the Merit Systems Protection Board after being removed from her position.

In answering this question, the court interpreted a statutory provision governing the conditions of Briggs' employment. The court compared the provision to a similar provision which explicitly exempted a federal employee from the section of the CSRA at issue in *Briggs*. Based on this comparison, the court concluded that "[t]o interpret the section as giving the Council the option to disregard additional, unenumerated parts of [the CSRA] would run afoul of the maxim '*expressio unius est exclusio alterius*,' and in a domain where, * * * Congress knows how to exempt a civil service position from the protections * * * if it so desires." *Briggs*, 83 F.3d at 1388 (citing *Todd v. Merit Systems Protection Board*, 55 F.3d 1574 (Fed. Cir. 1995)).

fore, we reduced Siderca's costs by that same amount. This enabled us to calculate an accurate COP that reflected Siderca's actual costs related to its sales to the PRC." Remand Determination at 13.

Commerce's interpretation here was consistent with Congressional intent concerning the goals of the antidumping regime and therefore represents a permissible construction of the statute.

CONCLUSION

For the reasons stated above, Commerce's Remand Determination in *U.S. Steel Group A Unit of USX Corporation, et al. v. United States*, 973 F. Supp. 1076 (1997) is affirmed.

(Slip Op. 98–18)

TAIWAN INTERNATIONAL STANDARD ELECTRONICS, LTD. ("TAISEL"), PLAINTIFF *v.* UNITED STATES AND THE U.S. DEPARTMENT OF COMMERCE, DEFENDANTS

Court No. 92–08–00532

(Dated February 25, 1998)

JUDGMENT

AQUILINO, JR., *Judge:* The plaintiff having interposed a motion deemed made pursuant to CIT Rule 56.2 for judgment upon the record compiled by the International Trade Administration, U.S. Department of Commerce ("ITA") *sub nom. Certain Small Business Telephone Systems and Subassemblies Thereof From Taiwan; Final Results of Antidumping Duty Administrative Review*, 57 Fed.Reg. 29,283 (July 1, 1992); and the court in slip op. 97–40, 21 CIT ___, 963 F.Supp. 1202 (1997), having granted the motion to the extent of remand to the ITA for reconsideration of plaintiff's sales to the United States that were canceled or re-exported and also of the best information otherwise available; and the agency having reconsidered these matters, as reflected in *Small Business Telephone Systems and Subassemblies Thereof from Taiwan* Final Results of Redetermination Pursuant to Court Remand (July 3, 1997) filed herein and which reduced the margin of dumping for the plaintiff from 129.73 to 8.11 percent; and the plaintiff not having availed itself of its opportunity to contest or otherwise comment on these remand results herein; Now therefore, after due deliberation, it is

ORDERED, ADJUDGED and DECREED that the ITA's *Small Business Telephone Systems and Subassemblies Thereof from Taiwan* Final Results of Redetermination Pursuant to Court Remand (July 3, 1997) be, and they hereby are, affirmed.

(Slip Op. 98–19)

TECOM CO., LTD., PLAINTIFF *v.* UNITED STATES AND THE U.S. DEPARTMENT OF COMMERCE, DEFENDANTS

Court No. 92–08–00538

(Dated February 25, 1998)

JUDGMENT

AQUILINO, JR., *Judge:* The plaintiff having interposed a motion deemed made pursuant to CIT Rule 56.2 for judgment upon the record compiled by the International Trade Administration, U.S. Department of Commerce ("ITA") *sub nom. Certain Small Business Telephone Systems and Subassemblies Thereof From Taiwan; Final Results of Antidumping Duty Administrative Review,* 57 Fed.Reg. 29,283 (July 1, 1992); and the court in slip op. 97–42, 21 CIT ___ (1997), having granted the motion to the extent of remand to the ITA for reconsideration of plaintiff's computer data, circumstances of sales and levels of trade; and the agency having reconsidered these matters, as reflected in *Small Business Telephone Systems and Subassemblies Thereof from Taiwan* Final Results of Redetermination Pursuant to Court Remand (July 3, 1997) filed herein and which reduced the margin of dumping for the plaintiff from 18.1 to 8.11 percent; and the plaintiff not having availed itself of its opportunity to contest or otherwise comment on these remand results herein; Now therefore, after due deliberation, it is

ORDERED, ADJUDGED and DECREED that the ITA's *Small Business Telephone Systems and Subassemblies Thereof from Taiwan* Final Results of Redetermination Pursuant to Court Remand (July 3, 1997) be, and they hereby are, affirmed.

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